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Supreme Court of the United States

OCTOBER TERM, 1917

No. 25

ELMER W. HENDERSON, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

FILED FEBRUARY 21, 1917.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 570

ELMER W. HENDERSON, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 3829

ELMER W. HENDERSON, 2560 McCulloh Street, Baltimore, Maryland, Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION, Washington, D. C. and The United States of America, Defendants

COMPLAINT TO ENJOIN, SUSPEND AND SET ASIDE ORDER OF INTERSTATE COMMERCE COMMISSION—Filed December 11, 1947

1. Jurisdiction of the Court is in Title 28, U. S. Code, Sec. 41, paragraph 28 and Sections 43-48; Title 49, U. S. Code, Sec. 17, paragraph 9.

2. This suit is brought by the Plaintiff, a citizen of the United States and a resident of the State of Maryland, against the United States of America and the Interstate Commerce Commission to enjoin, suspend, set aside and annul an order of the Commission dated September 5, 1947, dismissing the plaintiff's petition for an order requiring the Southern Railway System to cease and desist its violations of Title 49, U. S. Code, Sections 1 (4), 3, and 4 (1); as a result of which the plaintiff was subjected to undue and unreasonable disadvantage and prejudice and was denied full and equal benefit and protection of the laws of the United States and was deprived of his rights, privileges and immunities as a citizen of the United States traveling in interstate commerce.

3. On May 17, 1942, the plaintiff, a Negro, a first-class passenger on a train of the Southern Railway System, a common carrier subject to the provisions of the Interstate Commerce Act, traveling from Washington, D. C. to Atlanta, Georgia, was refused service at the two tables reserved for Negro passengers, said tables being then occupied by white passengers although some seats were vacant. Having failed to be notified by the Steward when he could be served, as promised, he returned to the diner and de-

[fol. 5] manded to be seated and served at a vacant seat available. He was refused service again and was offered to be served at his Pullman seat or later in the dining car when there was a vacant seat at the reserved tables at a time when no white passengers were seated there. At all times when the plaintiff demanded service there were vacant seats in all parts of the car. The refusal of the railroad to seat and serve the plaintiff was based upon an alleged regulation of the carrier, unpublished and unknown to the plaintiff, which required that Negro passengers be served only at the two reserved tables and only when said tables were not occupied by white passengers. The diner was taken off in Greensboro, N. C. and the plaintiff was never served. As a result thereof the plaintiff was greatly embarrassed and humilated, was forced to forego his meal, was denied the facilities and advantages provided by the railroad for other passengers and was compelled to hire counsel to seek the enforcement of his rights.

4. On May 13, 1944, Division 2 of the Interstate Commerce Commission found that the carrier's act was discriminatory but dismissed the complaint and on September 18, 1944 the Commission dismissed the plaintiff's petition for further hearing.

5. This Court by its decree dated February 18, 1946 set aside the said order and remanded the case to the Commission for further proceedings in conformity with its decision.

6. On October 5, 1946 further hearing was had before a Commission examiner whose proposed report exceptions were filed on May 5, 1947. The case was argued before the full Commission which on September 5, 1947 issued its report finding that the plaintiff was subjected to undue and unreasonable prejudice and disadvantage and that the dining car regulations of the Southern Railway were not violative of the Interstate Commerce Act. By its order of the same date the Complaint was dismissed. A copy of said report and order are appended hereto as plaintiff's Exhibits A and B and made a part hereof.

7. Plaintiff alleges that the railroad violated Section 1 (4) of the Act in that it failed to provide reasonable facili- [fol. 6] ties and to make reasonable rules and regulations with respect to the operation of through routes.

8. Plaintiff alleges that the railroad violated Section 3(1) of the Act in that it practised undue and unreasonable preference and disadvantage against the plaintiff and subjected him to undue and unreasonable prejudice and disadvantage by the discriminatory, unlawful, and humiliating use of a curtain around tables allegedly reserved for colored passengers, and by giving unlawful, discriminatory, and unnecessary preference and advantage to certain white passengers, in respect to transportation and facilities in that it seated and served them at any vacant seat in the diner but refused such service to the plaintiff solely on account of his color.

9. Plaintiff further avers that the railroad's enforcement of its alleged regulation and that any regulation requiring separation of passengers according to race or color is unreasonable, unlawful and violative of his constitutional rights as a passenger traveling in interstate commerce; and that the railroad has no authority to issue or enforce any such regulation nor is it within the power of the Interstate Commerce Commission so to approve.

10. Plaintiff avers that the order of the Commission of September 5, 1947 is without rational basis, was issued in error, and if allowed to become effective will result in irreparable harm to the plaintiff and deprive him of his liberty without due process of law, all in violation of his constitutional rights.

Wherefore, the plaintiff prays:

1. That the Court find that the refusal of the Interstate Commerce Commission to issue an order to the Southern Railway System to cease and desist the violations aforesaid is erroneous and is in contravention of the rights of the plaintiff.

2. That this Court issue herein a preliminary injunction suspending or restraining the enforcement of, and setting aside the order of the Interstate Commerce Commission, dated September 5, 1947, dismissing the plaintiff's petition.

[fol. 7] 3. That upon final hearing of this cause, a final decree be entered setting aside the order entered in Docket #28895 of the Interstate Commerce Commission.

4. That the plaintiff have such other and further relief as the nature of the case may require and to the Court may seem just and proper.

Lawson, McKenzie & Windsor, 2001 11th St., N. W., — 1, Attorneys for Plaintiff, by B. V. Lawson, Jr., Josiah H. Henry, Jr., 22 St. Paul Street, Baltimore, Md.

Duly sworn to by Belford V. Lawson, Jr. Jurat omitted in printing.

Certificate of Service

Copies of the above Complaint and Attached Exhibits A and B served by registered mail on the U. S. Attorney General, Department of Justice, Washington, D. C. and Interstate Commerce Commission, Washington 25, D. C. the 18 day of November, 1947.

B. V. Lawson, Jr.

Service of a copy of the above Complaint and attached Exhibits A and B acknowledged this —day of ——, 1947.

—— ——, United States Attorney for the District of Maryland.

[fol. 8] EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

No. 28895

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

Submitted July 1, 1947. Decided September 5, 1947

Upon further hearing, prior report 258 I. C. C. 413, defendant's present regulations, requiring separate accommodations for white and Negro patrons of its dining cars, found not in violation of the Interstate Commerce Act. Complaint dismissed.

Belford V. Lawson, Jr., for complainant.
Charles Clark and *A. J. Dixon* for defendant.

Report of the Commission on Further Hearing

By the Commission:

The complainant filed exceptions to the report proposed by the examiner, and the issues were argued orally. Exceptions and requested findings not specifically discussed in this report have been given consideration and found not justified.

In the prior report, 258 I. C. C. 413, division 2 found that the failure of the defendant on May 17, 1942, to furnish dinner service in its dining car to the complainant, a member of the Negro race, while he was traveling as a first-class passenger from Washington, D. C., to Atlanta, Ga., subjected complainant to undue and unreasonable prejudice and disadvantage; that no basis for an award of reparation for damages had been shown; that the record did not disclose that the general practice of the defendant, as evidenced by supplementary instructions to its employees issued August 6, 1942, would result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service; and that the entry of an order for the future would serve no useful purpose. The complaint was dismissed.

Thereafter the complainant brought suit in the United States District Court for the District of Maryland seeking the following relief, as stated by the court:

> The specific form of injunctive relief sought is that the Commission order the Southern Railway Company to cease and desist from the form of treatment with respect to dining-car service given the complainant, and to establish and enforce in the future, for the benefit of complainant and other Negro passengers, dining-car facilities and services unconditionally identical with those established and enforced for white passengers, including the discontinuance of the Railway Company's present practice of using curtains around dining-car tables provided for Negro passengers.

[fol. 9] The statutory three-judge court held, in *Henderson v. United States*, 63 F. Supp. 906, that defendant's dining-car regulations in force when the prior report was adopted did not provide the equality of treatment required by section 3(1) of the Interstate Commerce Act, and were not, as the division found, adequate for the future. By decree

entered February 15, 1946, the court set aside the division's order of dismissal and remanded the case to us for further proceedings in the light of the principles announced in its opinion. We thereupon reopened the proceeding for further hearing, at which only the defendant presented additional evidence. The facts stated in the prior report are not disputed, and will not be restated in full.

Other holdings of the court which directly affect our disposition of the issues now before us may be summarized, as follows: That racial segregation of interstate passengers is not per se forbidden by the Constitution or by any act of Congress; that the failure of the Congress to exercise its power under the commerce clause of the Constitution to legislate with respect to race segregation in interstate travel is equivalent to a declaration that interstate carriers may separate white and Negro passengers, but that they must afford substantial equality of treatment to members of both races traveling under like conditions; that the prohibition of section 3(1) of the act, against subjecting any person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, embraces the matter of dining-car facilities, as well as seating, sleeping, or other facilities of interstate carriers; that the division correctly found the complainant had been subjected to undue and unreasonable prejudice and disadvantage; that complainant's right to future relief does not depend upon whether he intends to make a similar journey in the future; that the division erred in finding that defendant's general practice, evidenced by its instructions to employees as supplemented August 6, 1942, would not result in substantial inequality of treatment as between Negro and other passengers seeking dining-car service; that when railroad regulations permit the seating of white passengers at tables reserved for Negroes, equality of treatment requires that Negro passengers be seated at any available seats in the dining car when the space reserved for them is occupied; that the alternative afforded Negro passengers of being served in their coach or Pullman space without extra charge therefor, does not constitute an offer of service substantially equivalent to that furnished in a dining car; and that an arrangement whereby tables are set aside for the exclusive use of white passengers, while none is reserved exclusively for Negroes, does not afford substantially equal treatment.

Concerning the application of State segregation laws to interstate passengers, the court concluded that——

> it is not necessary to approach the present case from this aspect, because, as we have said, the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decisions; and likewise, the railway company does not rely upon them.

After *Henderson* v. *United States, supra,* was decided on December 17, 1945, the defendant issued the following new instructions, now being observed by its dining-car employees:

> [fol. 10] TRANSPORTATION DEPARTMENT CIRCULAR No. 142. CANCELLING INSTRUCTIONS ON THIS SUBJECT DATED JULY 3, 1941, AND AUGUST 6, 1942
>
> Subject: Segregation of White and Colored Passengers in Dining Cars.
>
> To Passenger Conductors and Dining Car Stewards.
>
> Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:
>
> (1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.
>
> (2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.
>
> (3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all

times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946.

R. K. McClain, Assistant Vice-President.

The curtains separating the tables reserved for Negroes from the rest of the tables, and the conditions which prompted their installation, are described in the prior report. At the time of the further hearing, the defendant had removed the curtains from one of its dining cars and had constructed in their stead permanent wooden partitions approximately 5 feet high extending from the sides of the car to the aisle. The table which formerly occupied the space opposite the one now reserved exclusively for colored passengers, as described in rule (1) of the foregoing regulations, has been removed and the space is utilized as an office for the steward. That position affords the best view of the entire car, including the entrance to the kitchen and pantry, and from it the steward can best supervise the service. As its dining cars are sent to the shops for repairs in the future, it is defendant's intention to make similar structural changes in all of them.

The current regulations were designed by the defendant to meet the court's criticisms of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has abolished its former practice, condemned by the court, of permitting white patrons to be [fol. 11] seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for members of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no circumstances are white passengers served in such space; nor are colored passengers served elsewhere in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

Concerning the adequacy of the space reserved for Negro passengers, defendant's Superintendent of Dining Cars presented in evidence the results of two tests made under his direction and supervision showing the number of meals served to white and Negro patrons, respectively, in dining

cars operated by defendant between Washington, D. C., and Atlanta, Ga. During the 11 days May 14 to 24, 1945, a total of 37,615 meals were served, of which 446, or 1.19 percent, were served to Negro civilians and 706, or 1.88 percent, to Negroes in the military services. Of the 20,789 meals served during the first 10 days of October 1946, 723, or 3.48 percent of the total, were served to Negro civilians and 149, or 0.72 percent, to Negro service people. It is defendant's practice to serve white and Negro soldiers together, without distinction. Under the current regulations setting apart four seats for Negroes, slightly more than 8 percent of the seating space in its dining cars is reserved unconditionally for the use of approximately 4 percent of the patrons. The capacity of the cars, now 48 seats, will be reduced to 44 seats as the offices for stewards are installed. A further fact disclosed by the described tests is that rarely is defendant requested to provide diner service for more than four Negroes at the same meal.

As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 percent during the May 1945 test period to 3.48 percent during the October 1946 period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space.

With respect to the contention of complainant that the use by defendant of curtains or partitions, as described, violates the rule of substantially equal treatment, and results in undue preference and prejudice, in that Negroes are subjected to humiliation and embarrassment not experienced by white passengers, the statutory court stated that the method of carrying into effect the principle of segregation approved by the Supreme Court is for us to determine. In *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352, decided April 8, 1947, after concluding that the evidence did not justify a finding that equality of treatment can result only from the discontinuance of segregation in dining cars, we found that the dining-car regulations under consideration herein were not shown to be in violation of section 3 or of any other provision of the act we administer. The record in the instant proceeding does not warrant a different conclusion; nor does

it afford sufficient justification for condemning the methods by which defendant separates the tables reserved for white and colored patrons.

[fol. 12] In support of his position that defendant's current regulations constitute an undue burden on interstate commerce, the complainant relies upon the recent decisions of the Supreme Court in *Morgan* v. *Virginia*, 328 U. S. 373, and of the United States Court of Appeals for the District of Columbia in *Matthews* v. *Southern Ry. System*, 157 Fed. (2d) 609, wherein statutes of the State of Virginia requiring the separation of white and colored passengers on interstate motorbuses and railroad coaches were held unconstitutional and invalid. The cited cases are readily distinguishable from the instant proceeding. They involve the power of a State to regulate interstate commerce, whereas the issue here concerns regulations of an interstate carrier. As stated previously herein, the statutory court in *Henderson* v. *United States*, *supra*, pointed out that it was not necessary to approach the case from the aspect of State segregation laws, and concluded that the inaction of Congress respecting segregation means that interstate carriers may separate white and colored passengers if substantial equality of treatment is accorded both races when traveling under like conditions. Defendant's dining-car regulations apply only to service in dining-cars, which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemned as imposing an undue burden on interstate commerce. We think it evident that the cases to which the complainant refers are not determinative of the issues herein.

Upon further hearing, we affirm the prior findings that complainant was subjected to undue and unreasonable prejudice and disadvantage, and that no basis for an award of reparation for damages has been shown. We further find that the dining-car regulations established by defendant effective March 1, 1946, and currently in force, are not shown to be in violation of section 3, or of any other provision of the act. An order for the future is not necessary.

The Complaint will be dismissed.

AITCHISON, *Chairman*, dissenting in part:

For the reasons stated in my dissenting-in-part expression in *Mays* v. *Southern Railway Co.*, 268 I. C. C. 352, decided April 8, 1947, wherein we considered the identical dining-car regulations that are considered herein, I dissent from the finding that these regulations, now currently in force, are not shown to be in violation of section 3, or of any other provision of the act.

In addition, the current regulations leave entirely to the discretion of the individual passenger conductors and dining car stewards the determination of whether passengers are "white" or "colored." Discriminations and prejudices will be the inevitable result of the uncertain guide afforded by the quoted words.

I am authorized to say that Commissioner Mahaffie concurs in this expression.

Commissioner Mitchell did not participate in the disposition of this proceeding.

[fol. 13] EXHIBIT "B" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of September, A. D. 1947

No. 28895

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

It appearing, That on May 13, 1944, division 2, made and filed its report and entered its order in the above-entitled proceeding, and that on September 13, 1946, this proceeding was reopened for further hearing;

It further appearing, That the proceeding has been further heard, and that the Commission, on the date hereof, has made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said

report and the aforesaid report of May 13, 1944, are hereby referred to and made parts hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 14] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed December 24, 1947

Now comes the United States of America, defendant in the above case, and for its answer to the complaint filed herein answers and says:

1. Answering paragraph 1 of the complaint, defendant admits that this Court has jurisdiction of the cause and of the parties thereto.

2. Answering paragraphs 2 through 6, inclusive, of the complaint, defendant admits and alleges that the Interstate Commerce Commission in the due course of administrative procedure, including full and fair hearings at which plaintiff had the opportunity to submit evidence and argument, duly made its report and order of September 5, 1947, appended to the complaint as Exhibits A and B.

3. Answering paragraphs 7 through 10, inclusive, defendant denies the allegations thereof and alleges that the Commission's said order of September 5, 1947, was duly made upon substantial evidence and in accordance with applicable law and was and is in all respects valid and lawful.

4. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

[fol. 15] Wherefore, defendant prays that the relief prayed for by plaintiff be denied and that the complaint be dismissed.

Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Bernard J. Flynn, United States Attorney.

John F. Sonnett, Assistant Attorney General. Bernard J. Flynn, United States Attorney.

I certify that copies of the foregoing answer were this day mailed to the following persons:

B. V. Lawson, Jr., Esq., 2001 Eleventh Street N. W., Washington, D. C.

Josiah F. Henry, Jr., Esq., 22 St. Paul Street, Baltimore, 2, Maryland.

Allen Crenshaw, Esq., Interstate Commerce Commission, Washington 25, D. C.

This — day of December 1947.

Edward Dumbauld, Special Assistant to the Attorney General. Bernard J. Flynn, United States Attorney.

[fol. 16] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed February 5, 1948

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereunto or unto

so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I and II of the complaint, the Commission admits jurisdiction of the Court of the action herein and venue of the parties thereto.

II

Answering the remaining allegations of the complaint herein, the Commission alleges that proceedings involved in this action were instituted upon the filing of a complaint by the plaintiff herein with the Commission on October 10, 1942, seeking an order against the defendant, the South-[fol. 17] ern Railway Company, requiring said defendant to cease and desist alleged violations of the Interstate Commerce Act, alleged to have been committed by said defendant, in respect to equal and just dining car facilities for Negro interstate passengers, alleged to have been incurred or sustained by the said complaint; that thereafter said complaint was made the subject of hearing held at Washington, D. C., February 24, 1943, under Docket No. 28895, at which hearing evidence was submitted by the parties in interest, including plaintiff herein, following which the examiner submitted his recommended report dated May 28, 1943, to which exceptions were filed by said complainant, plaintiff herein; that thereafter Division 2 of the Commission entered its report and order of May 14, 1944, wherein it was decided that the complainant, plaintiff herein, had been subjected to undue and unreasonable prejudice and disadvantage as a result of a casual incident, and because of bad judgment on the part of an employee on the defendant railroad, and over-crowding of trains due to war conditions, and not because of general practices or rules of defendant, which were held adequate to avoid in the future any inequality of treatment as between Negroes and other passengers seeking dining-car service, for which no order for the future would serve a useful purpose; and that complainant had not sustained any damage in consequence of the violation of Part I of the Interstate Commerce Act, on the basis of which an award of reparation could be made and for such reasons dismissed the complaint; and that complainant filed a petition for reconsideration

and further hearing on July 12, 1944, which was denied by the Commission at a general session, by order entered September 18, 1944; that thereafter plaintiff instituted action in this Court, which was decided by the statutory court on December 17, 1945, with opinion and decree 63 [fol. 18] F. Supp. 906, setting aside and enjoining the said Commission order of Septemebr 18, 1944, for reasons therein stated; that thereafter the Commission reopened said proceedings, held further hearings, received the recommended report and order of its examiner, to which exceptions were filed by said complainant, heard and considered briefs and oral arguments submitted by counsel for complainant and other parties to the proceedings, and on September 5, 1947, made and entered its report on further hearing and order, Exhibits A and B to complaint herein, wherein it was found that the new rules, regulations, and instructions of the said Southern Railroad, issued after the Court decision of December 17, 1945, now provide full equality of treatment and service as between white and colored passengers in its dining-car service, under provisions in said rules, regulations, and instructions, for the separation or segregation of such white and colored passengers, thereby making it unnecessary and of no purpose to issue an order to said railro. l to cease and desist from practices and methods of separation or segregation of such Races, as was found to have constituted and resulted in discrimination against said complainant upon the occasion complained of, viz., May 17, 1942, under the rules, regulations, and instructions then in force and applied, and for such reasons, dismissed said complaint; and that the order of September 5, 1947, is the final order of the said Commission.

III

The Commission further alleges that the findings and conclusions in said report of September 5, 1947, were entered after a full and fair hearing, were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid, and that, in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention [fol. 19] on behalf of the parties to the said proceedings by their respective counsel.

The Commission further alleges that said report and order, above referred to, were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them, that in making said report and order the Commission did not exceed the authority conferred upon it by law, and denies each of and all of the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all of the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in the said report of September 5, 1947, above referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission. By: Allen Crenshaw, Attorney. Bernard J. Flynn, U. S. Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 20-23] *Duly sworn to by J. Haden Alldredge. Jurat omitted in printing.*

[fol. 24] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ANSWER OF INTERVENING DEFENDANT—Filed June 4, 1948

Comes now Southern Railway Company, intervening defendant herein, and, with leave of Court first had and obtained, files this its answer to the complaint herein.

This intervening defendant hereby adopts the answer herein filed on behalf of the Interstate Commerce Commission, a defendant in this cause, in the same manner and to the same extent as though each paragraph thereof were herein fully set out.

Wherefore, having answered, this intervening defendant prays that the complaint herein be dismissed at the cost of the plaintiff.

Charles Clark, A. J. Dixon, Attorneys for Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

[fol. 25] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 3829—Civil

ELMER W. HENDERSON

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Transcript of Proceedings—June 4, 1948

Before Judges Morris A. Soper, William C. Coleman, and W. Calvin Chesnut

[fols. 26-27] Baltimore, Maryland, June 4, 1948.

The above-entitled case came on for hearing, before Judges Morris A. Soper, William C. Coleman, and W. Calvin Chesnut, at 10 o'clock a. m.

APPEARANCES:

For the Plaintiff: Mr. Josiah H. Henry and Mr. Belford V. Lawson, Jr.

For the Defendants: For the United States of America: Mr. Bernard J. Flynn, Mr. Edward Dumbald, and Mr. William D. McFarlane. For the Interstate Commerce Commission: Mr. Daniel W. Knowlton and Mr. Allen Crenshaw. For the Southern Railway: Mr. Charles Clark and Mr. A. J. Dixon.

[fol. 28] Proceedings

Judge Soper: Gentlemen, this is the case of Henderson against the Interstate Commerce Commission and the

United States, in which the Southern Railway has been allowed to intervene.

How shall we proceed?

ARGUMENT OF MR. BELFORD V. LAWSON

Mr. Lawson: May it please the Court, we are here for the second time on this case. As the Court may remember, the record is practically the same, although there has been a subsequent hearing before the Commission, in view of the Court's ruling.

We offer the record in the previous case, and the ruling of the Commission, and the record in the subsequent hearing. The testimony, however, is practically identical. So, on the record, I think we can all agree that the record in the former case, coupled with the latest ruling of the Commission, constitutes this record. We are here today to set aside the order of the Commission, dated September 5, 1947.

Judge Soper: Before you go on, is it submitted on the prior record alone or on the prior record together with the record made in this particular case?

Mr. Lawson: Both records.

Judge Soper: Is that agreed?

Mr. Crenshaw: Yes, Your Honor. I think the new record [fol. 29] will include the new rule, the amended rule, of the Railway. That is practically the only difference between us.

Isn't that right?

Mr. Lawson: That is right. And there were certain exhibits of the defendant which go along with the new regulation, and very brief testimony in the new case. We offer that.

Judge Soper: I assume the new rule to which you refer is set out complete in the complaint or in the answer.

Mr. Lawson: Yes, sir.

Mr. Crenshaw: And also set out in the report of the Commission, which is attached.

Mr. Dumbald: I think the case should be tried on the complete record, because if the complete record is not here, then the Opinion of the Commission cannot be challenged, as per the Mississippi Valley case. So I think we are all in agreement that the case ought to be tried on the complete record.

Mr. Lawson: This order of the Commission is dated September 5, 1947, dealing with the regulation regarding dining car facilities and service to negroes. We contend that the new regulation and the ruling and report of the Commission with respect thereto fails in three or four ways. We feel, first, that the Commission erred in failing to find that there was a violation of Section 1(4) of the Act, section 1(4) having to do with reasonableness of the regula-
[fol. 30] tion and Section 3, as to discriminatory and illegal aspects of the regulation.

We feel, further, that this new regulation violates the Fifth Amendment to the Constitution, and that it is against Federal public policy.

I think the defense blows hot and cold with respect to the statute. They make the contention in their brief, as I understand it, that there is no statute involved. We say that there is a statute involved. It was involved in the record before, and it is involved here.

In the last hearing before the Commission, one of the defendants' witnesses testified that the new regulation was based upon the statute. That was borne out by the record, at page 206, from which I read.

Judge Soper: Don't you think it would be helpful if you would tell us again what the new regulation provides?

Mr. Clark: In that case, if counsel has some extra copies of the Interstate Commerce Commission's report, it would be helpful.

Do you have any?

Judge Soper: We have only the one copy; and that is written on both sides.

Mr. Clark: I will be very glad to let the Court have my copy.

Mr. Crenshaw: Usually I have them for the Court, but I thought it was attached to the complaint. The only one I
[fol. 31] have is attached to the complaint.

Judge Soper: Aren't the reports of the Commission printed?

Mr. Clark: Yes, sir.

Judge Soper: Wouldn't it be easier to have printed copies of them?

Mr. Crenshaw: That is true. But, in the rush to get here this morning, I overlooked that detail; and I apologize.

Mr. Lawson: I suppose that was partially my responsibility; but I was in the same position. I was not sure we

were going to be heard this morning; and I rushed away, too, for which I, likewise, apologize.

The main difference in the regulation is this, that formerly the old regulation did not make the Jim Crow table absolute. It set up the table, or the small, two-seated table and the large, four-seated table in the corner near the kitchen, but did not make it absolute. So when a number of negroes, over and above the four or five seats provided, suddenly came into the diner, they could not eat. The new regulation makes the table absolute. It ropes it off and sets up a "Reserved" Card on that one four-seated table, so that white people cannot occupy it, whether negroes occupy it or not.

Judge Soper: What becomes of the table across the aisle?

Mr. Lawson: It is discontinued. There, instead of that table, is the Steward's table, the cash register, and all of [fol. 32] the rest. I have some exhibits that I would like to give to the Court at this time.

Mr. Dumbald: Was that in the record before the Commission?

Mr. Lawson: Oh, yes; it was in the record before the Commission; and I think they are in the record now. I think it would be very helpful at this point if those were offered in the record.

Our contention is that the new regulations are worse than the former regulations. The regulation is more discriminatory. It does not conform to the ruling of this Court. This Court held previously in this case that equality of treatment of the colored passenger subsequently applying for service, required that, if he could not be seated at the Jim Crow table, he be seated somewhere in the car. This Court held that if these two Jim Crow tables were occupied by white people, or were partially occupied by white people, and the seventh negrow came in and could not sit at one of the tables, he must be provided for some place in the body of the car. We claim that this regulation does not conform, first, because it is limited; we have but four seats.

Judge Soper: You had six before?

Mr. Lawson: Yes, sir. When the fifth person comes in now, the testimony before the Commission was that he would have to wait and could not, under any circumstances, eat.

[fol. 33] We feel, further, that this regulation, even though it provides for the absoluteness of one table, puts us right

up under the noise and confusion attendant to the Steward's operations, with the waiters making change, and that it is not, in any sense, equality of treatment. This table is set up against the kitchen-end of the car, which, admittedly, is not as comfortable. White people do not have to sit at that one table. They have a choice. They can sit anywhere; but negroes do not. They must sit there.

We feel, further, that it is hotter. Formerly, there was a curtain. We claim that it does not conform to the Virginia statute. It is set off by a partition which stops the free flow and circulation of air. It is not as comfortable, in any sense, as the old curtain or the two tables. It obstructs the view, and it makes it worse, because the curtain did completely hide the negro passengers. When you sit at that table, you can see the tops of the heads of the other passengers. It is much more humiliating than the condition under the old regulation, when we were shunted off and closed up. Now we are partially exposed, and it makes the other passengers in the car wonder what is behind this wooden partition.

Further, as we stated in our brief, and as the testimony will show, the Vice-President of the Southern Railway testified that these partitions were made for the convenience [fol. 34] of the company,—not the convenience of the passengers, as the Interstate Commerce Act requires. We think it is more expensive; and, in the long run, the public has to pay for these partitions.

Judge Soper: Why was there a partition for the convenience of the company?

Mr. Lawson: It is put at the kitchen-end of the diner where the Steward is, where the waiters come and make change, and where there would be less trouble for the company to operate there. They have disregarded completely the comfort and convenience of the passengers.

Secondly, it tends to make what we contend is wholly unequal and is a discriminatory process. If they put the Jim Crow table in the middle of the car or at the other end of the car, it would be much more desirable, in view of the heat, the noise and the confusion, and they could not apply the discriminatory practices with the ease that they can now.

More specifically, when a negro comes into the diner,—and I speak from personal experience,—he comes right by the kitchen door, and they put him in the corner, and he sits there until the white passengers are fed. He is obscured

and out of the way, and he sits there until the white passengers have been attended to.

Judge Soper: Why is that? Is there any evidence that [fol. 35] he is not served as promptly as any other passenger?

Mr. Lawson: I do not believe there is any direct testimony in the record. I do not recall any direct testimony; but I know, as a practical matter, that the condition exists.

Judge Soper: Is there a partition also on the Steward's side of the car?

Mr. Lawson: A partial partition. There is a partition which comes right up to the right of his "Cashier drawer"; but it does not go up as high as the partition at the table. I think the exhibits will indicate what I mean. There is a partition in the back of the Steward's cash drawer.

Judge Soper: On this picture (indicating), there is a partition on both sides of the car, and quite high.

Mr. Lawson: As I recall, the side partition——

Judge Soper: This is No. 4. There is a partition on both sides of the car.

Mr. Lawson: I think that picture was taken before the cash drawer was set in,—if your Honor will look at the other picture.

Judge Soper: We will come to the bunch. These are tables in the white section of the car (Indicating). And here (indicating) is the desk, or whatever it is, that the Steward has always had in the end of the car. And here (indicating) [fol. 36] is the table where the colored people sit.

Mr. Lawson: That (indicating) is the same on both sides of the aisle. But you see this partition (indicating) is much lower.

Judge Soper: There is nothing on the other side corresponding to that (Indicating)?

Mr. Lawson: No, sir.

Judge Soper: I understand your point that this does make for some confusion by crowding at this point; but I do not see what your point is with reference to these lower partitions.

Mr. Lawson: I make no particular point with respect to the lower ones. I make the point with respect to the higher partitions. It is more noticeable. It does not create the sort of curiosity when passengers, under the former regulation, could not be seen at all, except from the side.

We concede that the carriers have the right to make reasonable regulations. But, as we understand the Act, those regulations must be not only reasonable but must be efficient and necessary, and must be designed for the convenience of the passengers, and not for the convenience of only the carrier.

On page 7 of our brief we set forth our argument. The testimony in the case shows that Mr. McClain, Vice-presi- [fol. 37] dent of the Southern Railway, testified that the carrier undertook to regulate the conduct in the southern states, and that they undertake to maintain peace and good order, and that that was the reason for their regulation.

We say that it is without the perview of the carrier; that that is a matter for the legislature and for the courts. It is not, therefore, efficient and necessary. We claim that there is no reason for the regulation.

One witness testified that if negroes were not discriminated against, probably there would be a race riot; that the white passengers would not like it.

Another witness for the railroad, a waiter who had been in the employ of the Southern Railway for 28 years, whose name is John White, had this to say,—and I am reading from the record: that he had been employed for 28 years; that he had often served white and colored passengers who sat at the segregated table at the same time; and that the Steward did not draw the curtain; that quite often white people sat down with colored people; that he had seen colored passengers sit at the table while a white person was sitting there, but nothing had happened, and there was no objection. That is in the record at pages 96 to 99.

So I make the point that the contention of the railway that they must preserve peace and good order, and that white passengers would not like it, is simply not true, and [fol. 38] by their own testimony.

We claim, further, that it is not, as they claim, a matter of the regulation based upon usage and custom. I understand, of course, that it has been a long-time custom to separate the races. But mere usage and custom are not sufficient, and they are not applicable to interstate passengers. The customs are changing; and I think the Court ought to take judicial notice that the custom is changing. For instance, in aircraft they can't "Jim Crow" white and colored passengers,—not with the Morgan case and the

Matthews case,—in interstate traffic. Even in interstate railway and bus traffic the custom is not as it was formerly. The tendency is in the other direction.

So I submit that these regulations which allocate less space, which keep negro passengers up and under the noise and confusion and heat of the kitchen, and based, as they are, solely on race or color, are no regulations at all.

As I understand the purpose of Section 3 of the Act, it is to secure equality of treatment to all, and to prevent any sort of unjust discrimination. And it includes every form of unjust discrimination. The definitions which I have indicated,—and I think the law will bear me out—mean that they are not concerned only with rail transportation or bus transportation, but with dining car transportation. In other words, we are asking this Court to do what two members of the Commission did, what Chairman Aitchison and [fol. 39] Commissioner Mahaffie did in this case—adopt the view of the Supreme Court as announced in the Morgan case.

We contend that there is a very close analogy. As a matter of fact, we contend that the Supreme Court said that segregation in interstate bus transportation is an invalid burden on interstate commerce, and, in the Matthews case, it said that segregation in interstate rail transportation is an undue burden on interstate commerce. That applies with equal force to our situation here. We see no difference between interstate dining car transportation and interstate bus or interstate rail transportation. Stripped of all distinctions which we lawyers make, it is a matter of simple justice. Of course, distinctions can be made, but, in the final analysis, we say it is discrimination; it is unequal.

We contend further,—and I think this is a new argument —that the right to have equal treatment and equal facilities in a dining car is popular, just as much as any other popular right, and, therefore, it cannot be restricted by the carrier; and then to have the carrier come into court on the restriction of liberty, the freedom of locomotion and freedom of position, which we think are just as important as freedom to think or freedom to speak,—the same sort of popular right. We contend the carriers cannot restrict that. They cannot say to us: "Pay for this meal; but sit

up near the heat of the kitchen. You cannot sit any place."
[fol. 40] If your wife comes in with you, if she looks like she is white, you may be separated. If you come in with a white friend, you cannot sit with him. If five negroes come in, one of them must wait, under this new regulation.

We contend that distinctions on the legal technicalities are nothing. It is simply morally a legal requirement. I think it is time that this Court, and that all courts should do what Judge Edgerton did in the Covenant case. He had the courage to say that this was a question of public policy, and he laid the foundation for the decision in the Supreme Court in the Covington case.

Judge Coleman: Suppose you had two seats; I suppose you would still say that would not meet your contention? Suppose the diner were open for white people at a certain time, and then equally and completely open for negroes at another hour or time?

Mr. Lawson: I think that would be obviously wrong. I think this Court's decision on the former hearing in this case covered the law. Negroes get hungry in the same way and at the same time that white people do. While I do not want to be captious about it, I think, in a democracy, it is a question of freedom of choice and association. It seems to me that that is the heart of this whole question of segregation, and not only here, but the whole system of segregation in the entire nation.

[fol. 41] Judge Chesnut: Your first main point is that there should be no recognition or countenancing of segregation?

Mr. Lawson: In interstate transportation. We feel that federal citizenship is something. It is different from state citizenship. When these interstate passengers go on these trips, they are clothed with federal citizenship; and, like ancient Roman citizenship, it should mean something. And, with federal citizens, these states can't do——

Judge Chesnut: The state is doing nothing here. The Interstate Commerce Commission is a federal agency.

Mr. Lawson: That is two points. I admit that one thing is confusing. They say in one instance that they made this regulation on basis of a state statute. If that is so, it goes out under the Morgan case. On the other hand, they say it is just a regulation. We say that the Interstate Commerce

Commission, as an agency of the Federal Government, cannot condone and sanction these burdensome impositions on federal citizens in interstate commerce.

On that point the Supreme Court, in the Covenant Case, had something to say. I recognize the distinction; but here is what it said. There are other considerations which would indicate that enforcement of these covenants is judicial sanction contrary to public policy.

"The power of the federal courts to enforce the terms of private agreements is at all times exercised subject [fol. 42] to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."

That is one of the main points in our argument,—that we are restricted in choice and association, and that that is an undue burden which federal citizenship should not have imposed upon it.

So, finally, I ask you to adopt the view of the dissent of the Commission in this case, and to hold that the Morgan case and the Matthews case control dining car transportation interstate.

ARGUMENT OF MR. EDWARD DUMBALD

Mr. Dumbald: If Your Honors please, I am Edward Dumbald, Special Assistant to the Attorney General. I was in Detroit yesterday, but I managed to get a seat on a plane. I am very happy to be in this Court today. I will apologize in advance for the inadequacy of preparation, but I trust that what I do say may be helpful to the Court.

I should say at the outset that I desire to treat the questions here in issue in this case solely upon the basis of existing law. I do not think the case should be decided upon any principles of moral philosophy or political evangelism, or upon these basic doctrines of liberty and free association and the other things which, very eloquently and very properly, my adversary has rested his case on.

From the brief glance that I have had of the plaintiff's [fol. 43] brief here, it seems to me that there is a concession made that actually there is no violation of the Interstate Commerce Act or of God's law, but that the general spirit of the constitution and of American citizenship indicate that there is an inequity of treatment, or separateness

of people who should be joined together in a common federal citizenship which, perhaps from a philosophical or ethical standpoint, is a perfectly reasonable argument.

Judge Soper: Where do you find the concessions that you are talking about?

Mr. Dumbald: I think it is page 16a. It is somewhere in this mimeographed brief. I can find the page later on, if the Court please. But it does say in there that there is no violation of the law but of the spirit of the constitution.

My thought is that, while being a biographer of times just recent—and Judge Wilkins recently made a nice review of my book *of* the Bar Association Journal,—I should be very sympathetic to this type of doctrine; but I would like to discuss the case, if the Court please, on the basis of existing law, beginning with this Court's prior decision.

As I understand this Court's prior decision, the Court has said that separation per se is not a violation of law, and that, therefore, the question really is whether these new regulations do afford equality of treatment, even though they rest upon the basis of separation. In view of what [fol. 44] this Court has decided, it becomes pertinent to consider whether any subsequent decisions of the Supreme Court have changed the law in any respect. I submit that they have not changed the law. There is the Morgan case and the Covenant cases, which are the cases which have been decided subsequently in the Supreme Court; and, in the other Federal Courts, there are some cases which support the Commission's action here, which are cited in Mr. Clark's very able brief on behalf of the Southern Railway.

Coming to the Supreme Court cases, the Morgan case, as has been conceded by counsel, was based upon the interstate commerce power of the Congress. The theory is that there are certain actions which burden interstate commerce, and that the courts may determine when such a substantial burden exists. There was a dissent, I believe,—Mr. Justice Black and some other Justice taking the view that the commerce power is a power given to Congress to regulate commerce, and that the courts should not undertake to decide what does or does not burden it. But the majority of the Court did follow the customary rule that the Courts may determine what is an undue, direct and substantial burden upon interstate commerce. They decided, on the facts in the Morgan case, that there a substantial burden

did exist. It dealt with a criminal case, as I recall, in which there was a prosecution under a Virginia statute, of a pas-
[fol. 45] senger who would not move from the place where he was sitting, at the direction of the operator of the bus, contrary to a Virginia statute. It was a criminal case, and the Court held that such a statute, when applied to interstate bus passengers and would require them, as Justice Reed said, to move many times in the night, did impose a burden on interstate commerce.

If that principle is applied to the case here, it is obvious that it is entirely inapplicable. This separation would apply not in the night time, and with inconvenience only at meal times. It would not apply to changing seats in the bus. It relates entirely to the dining cars of a railroad; and I see no application of the Morgan case to this case.

Furthermore, this is a case based upon the carrier's own regulation. It is not based upon any state statute or upon any federal statute, or any legal compulsion whatsoever. It is merely a question of applying a voluntary regulation made by the carrier itself.

Judge Coleman: I would like to ask at this point, what is your view with respect to Pullman sleeping car service.

Mr. Dumbald: Well, that is not involved in this case.

Judge Coleman: No; I know it is not. But, by analogy [fol. 46] or relation, what is your feeling about that, from the point of view of segregation?

Mr. Dumbald: The Mitchell case held, as I recall, that there must be equal facilities for the two races. And the practice of the company in that case did not afford such equality. It made it possible for a white passenger, on the very day of travel, to apply for and receive accommodations, whereas the colored passenger could not. The colored passenger had to make application sufficiently in advance, or they would give him a drawing room at the same rate as the ordinary berth. But there were insufficient facilities furnished in that case, as the Commission found.

Judge Coleman: My question relates to whether you would draw a definite distinction between attempts to segregate with respect to meals and attempts to segregate with respect to sleeping car service.

Mr. Dumbald: I think the same principle would apply in both cases. There would have to be, in fact, equal and adequate service for all passengers, or whichever race. I

doubt whether the Morgan case would change the situation any, or the Mitchell case with respect to Pullman transportation. I believe berths would be assigned once and for all, and there would be no changing back and forth permissible, I would say. There must be, under this Court's decision, equal service for all passengers; but it may be a [fol. 47] separate service. That is what I understand the Court's ruling to be, and what I understand the existing law to be. Whether it exposes the passengers to public view, whether they can be seen,—of course, in a drawing-room, I suppose you could not be seen; but in a coach or a Pullman car, I think it is one of the inevitable incidents of travel that people can see you. I don't think there is anything that shows any humiliating inequality when people can see you and see what you look like. So, it is my contention that, under the existing law as laid down in the Mitchell case and in this Court's decision in this case, and in the Morgan case, and, finally, in the Covenant Cases,—And the Covenant Cases really are not applicable here at all, so far as interstate transportation is concerned. They are perhaps illustrative of the great general principles of liberty and citizenship, and policy, and matters of that sort. But the actual decision in the Covenant Cases is that where the state action, to-wit, the act of the courts in enforcing the covenant, is not concerned, the covenants are perfectly valid and legal; and, as long as they are voluntarily carried out, they are not subject to any invalidity. Therefore, applying the principle of the Covenant Cases to this case, it seems to me that as long as it is recognized that we have here a voluntary regulation of the carrier, and is not being imposed by any state agency, and is not being imposed by any Federal agency, it is simply a voluntary regu- [fol. 48] lation with which the Court should not interfere.

Now, if the Court please, that is my view of the existing law. In the few hours that I had yesterday after finishing the other matter, I have not been able to review these cases. Perhaps the Court would like to hear from my associate, Mr. McFarlane, who, in my absence, was endeavoring to make some preparation on the facts of the case and has set forth the regulations that we had available in the trial.

Judge Soper: Mr. McFarlane?

Mr. McFarlane: If Your Honor please, I do not have anything to say.

Mr. Crenshaw: May it please the Court, I was before the Court the last time in this case, but I would like to confess that, when we tried the other case, I think both Mr. Clark and I have been somewhat overwhelmed by the tremendous volume of traffic on the railroads, and the usual long line of waiting passengers looking for seats. So we overlooked the discrimination that this Court found; and both of us, as we left the Courtroom, thought we did not discover it.

Judge Soper: You had not discovered what?

Mr. Crenshaw: Had not discovered the discrimination [fol. 49] involved in the prior rule, which this Court pointed out in the course of the argument before.

Judge Soper: What was there mysterious about it that concealed the defect from you?

Mr. Crenshaw: I think it was because of the utter crowded condition it was thought best, under the situation then existing, to say that all tables were always full.

Judge Soper: Of course it would have been very much easier, in your crowded capacity, to just abolish the discrimination; and then there would have been far more room for everybody.

Mr. Crenshaw: You mean to simply say that segregation is abolished?

Judge Soper: Why, surely.

Mr. Crenshaw: Maybe the Commission could say that; but I don't think so. And that is the view of the Commission. The Commission is limited, as you have seen all the way through these cases, to the authority and jurisdiction that is conferred by Congress. And that does not include segregation.

Judge Soper: What doesn't include segregation?

Mr. Crenshaw: The Interstate Commerce Act, under which we receive all of the authority that the Commission has given to it.

[fol. 50] Judge Soper: You mean to say that it does not forbid segregation?

Mr. Crenshaw: It does not forbid it. It does not prohibit it; and, therefore, I say that the Commission has no authority to do either.

Judge Soper: Do you mean to say that the Commission could not abolish this practice, if it wanted to?

Mr. Crenshaw: I do not think so.

Judge Soper: Why not?

Mr. Crenshaw: Because they are not given the authority to do it, unless it involves a discrimination, a preference. If it does that, the Commission has the right to do it.

Judge Soper: There is nothing in the statute which requires them to segregate, is there?

Mr. Crenshaw: Not a thing. We do not segregate them.

Judge Soper: I am asking you whether this statute requires the policy of segregation?

Mr. Crenshaw: No, sir.

Judge Soper: Then, why did you say that you have no authority to abolish the practice?

Mr. Crenshaw: Because we are limited.

Judge Soper: Limited in what?

Mr. Crenshaw: We are limited to what the Interstate Commerce Act says to us. Practically every order of this [fol. 51] Commission that has been overturned by a court——

Judge Soper: Do you mean to say, as Judge Coleman suggests, that you do not put the practice into effect; that the railroads put it into effect?

Mr. Crenshaw: That is right, sir. It is a railroad rule.

Judge Soper: And you have no authority to forbid it unless it is discriminatory?

Mr. Crenshaw: That is right, sir. That is exactly what I mean. I do not see how we could go any further than that. It seems to me that if we undertook to enforce a rule or make a rule as to separation of the races, unless discrimination were involved in it, we would go beyond our authority, and it would be set aside. That is the usual ground upon which the courts set aside commission orders.

Mr. Dumbald was seeking to tell the Court something about this. I regard it as a constitutional question, unless there is a question of discrimination involved. In the printed brief, page 16, at the bottom, here is what is said:

> "The plaintiff does not contend that segregation is 'forbidden' *per se* by the Constitution, the Interstate Commerce Act, or any other act of Congress."

Mr. Dumbald: That is the page I was endeavoring to cite to Your Honors.

> Mr. Crenshaw: "The plaintiff does not contend that segregation is 'forbidden' *per se* by the Constitution,

[fol. 52] the Interstate Commerce Act, or any other act of Congress, in the sense that there is an outright prohibition."

May I say in passing that the Court, in the last Opinion we had, stated that very thing. That is practically verbatim what this Court said.

"The plaintiff does contend that segregation is a violation of the spirit and purpose of the Constitution."

If it is, then it is something I do not think the Commission has jurisdiction or authority to pass on. It is certainly the wrong tribunal, when it is undertaken to be enforced on the basis of the Interstate Commerce Act. We are limited. If there is such an opportunity to present that view of the case, it would be in a Federal Court or in a State Court, where these other cases are springing up. This is not a matter that the Commission has decided the right or wrong of. The Commission has always based its decisions upon the limitations of its authority to act. Even if all that they contend here were true,—leaving out the question of discrimination and preference,—if I were to admit that as a Member of the Commission, still I would have no authority to enforce my own personal opinion.

Judge Soper: Admit what?

[fol. 53] Mr. Crenshaw: That, under the constitution, segregation is right or wrong,—or under the spirit of the constitution.

The Court has implied something about what one might believe. Maybe it would be interesting for me to say that I grew up on a plantation full of negroes. I doubt if anybody knows them much better than I do. I doubt if anyone has more sympathy for them than I have. I spent a lifetime trying to help advance them, and I have spent a life-time trying to fight organizations that are against them; and I can say that I believe I have contributed as much as one ordinary individual could contribute to the advancement of the welfare and giving opportunities to the negroes in this country, particularly those I grew up with and those I have come in contact with. I have always formed my friendships with negroes just like I have with white people. There is as much difference among negroes, one from another, as there is among white people. Some of the finest

people I ever knew in my life, some of the best friends I have had in my life, were negroes. I would not stultify myself by trying to do any deliberate damage to any of them; and, if I had the opportunity, I would call many of them to testify to the fact that I have always been fair and honest with them. I hope I shall never be anything else than that. I am saying that preliminarily to what I am going to say.

[fol. 54] We are here dealing with a railroad rule which prescribes separation. I am sorry they use the word "segregation". And this advice was given the negroes by the man who freed them. He gave them this advice before he died: "You are two different races; and the best way you can live together is to live separately. It is difficult to get along. It is a difficult problem."

As American people, I think we recognize it. It is difficult, not only in the south. And when they accuse the south of being prejudiced on the subject, I do resent it, because I have known others, like Mr. Justice Black, of the Supreme Court, with whom I grew up, who did the same thing that I did. He fought to protect the rights of negroes all of his life. And I did it equally as much.

I have prepared to submit to the Court copies of a short memorandum brief, largely to call attention to the litigated cases that the Courts have ruled upon. I think I have set out all of them.

Judge Soper: You have not furnished them to the Court, have you?

Mr. Crenshaw: No, Your Honor; but I will do so right now, if I may.

There was some mention of the Covenant Cases. I mention those in my brief. I find that, in my hurry to get up the brief, they are given the numbers in the Supreme Court, —decided May 3rd of this year. I have interlined by pencil [fol. 55] the names of those cases.

Those were Covenant cases, in which the covenants required segregation. One came up from California, one from Washington, one from Michigan, and there were two or three from the District of Columbia. They were all companion cases. I believe none of them was in the south, unless we call Washington a southern city.

Another case there is the Bob-Lo case. Another case

was a Utah case which did not involve railroad rules. That was the Utah case.

The Bob-Lo case was the case of a Boat Company which transported people from Detroit over to an island that was restricted to white people. The Boat Company refused to sell a ticket to a negro, so he filed suit under the Michigan statute, which prohibited that sort of thing: and the Supreme Court decided it on that basis —that the Michigan statute was constitutional, under that ruling. That has nothing to do with the case here.

The previous case was decided under a state statute by a state court and, as this Court's opinion pointed out the last time, it has no relation to the railroad rule here involved.

In the Matthews case the only question was as to a charge to the jury. I don't know the status of that case now, but I think it has come back and has finally been disposed of. [fol. 56] Mr. Clark: Yes.

Mr. Crenshaw: Another was Simmons vs. Atlantic Greyhound Corporation, 75 F. Supp. 166. That was a bus case, under a bus rule; and the Court shows the difference between that and the Morgan case.

Another one, still more recent, was decided on May 5th by the Supreme Court of the State of North Carolina, which distinguishes between the Morgan case and these other cases that held against it, and upholds the segregation rule of the bus company in that case. The Court said in that case: "We know of nothing that makes segregation per se unconstitutional or violative of any Act of Congress."

That is practically what this Court said in its opinion here. I brought that out for these purposes,—because this matter of segregation is fast becoming a very, very serious problem, and not so much in the south as all over this country. I don't know what the outcome will be. I don't think anyone can say as to that. I think it would be tragic for the ambitions of the negro race. There are white people who do not want to live side by side in their homes and who do not like to be in railroad cars and in dining cars side by side at the same table with negroes.

The railroad rule in this case has to do with whom they serve. If some other railroad, that does not have patronage that demands or requires separation, that is one thing. But, [fol. 57] where they demand it, I doubt that Acts of Congress or decisions of courts can change the custom. And if some-

one wants to call it prejudice that exists in this country, and in almost every country, I don't know whether it will stop it or not. A more tragic means of ending it probably would be a Riot Act. If that occurred in this country, it would be more violent and harmful and damaging to the negroes than anything else. As a good citizen, I would regret it. In other words, it seems to me at this time that the ambitions should be boiled down to something that can reasonably be had and accomplished, and without trespassing upon the rights of other people. The white people have rights, too. They have the right to be prejudiced, if they want to be. We have to live together; and I think the way to live together peacefully is for both sides to be reasonable in their demands. I am saying this not because I think it is part of this lawsuit, but I do think that segregation is a matter which can not be solved in this manner. If it can be done, it will have to be done in some other tribunal.

ARGUMENT OF MR. CHARLES CLARK

Mr. Clark: Has there been an order permitting the Southern to intervene?

Judge Coleman: Yes; that has been signed.

Mr. Clark: May it please the Court, I think this case can be presented from a somewhat narrower outlook than [fol. 58] it has been so far. This is the second time that this same case has been before this same Court; that is, if I recall the prior decisions, which I take to be the law of the case. The subsequent decision of the Supreme Court and Judge Paul's decision in the Simmons case support those decisions, that is, that segregation in and of itself, segregation per se, is not a violation of the law and is not, in and of itself, discriminatory.

The case was sent back, following the first trial here, because of an infirmity in the rule of the railroad. That rule provided that there would be two tables, cut off by curtains; but the infirmity in the rule was that those tables were not set aside exclusively for negroes at all times. I think the Court properly sent the case back.

I might say to you that the rule was something of a temporary expediency to meet the wartime demand. If we made an error in that, at least it has now been corrected. So, the case is now narrowed to this simple question: Is the present rule of the Southern Railway, which the Commission has

found to be a reasonable rule, one that meets the test of Your Honors' previous decision? I think it does.

Having tried the case before, it fell to my lot to rewrite the rule to meet the criticism that the Court made of the prior rule. Mr. Dixon and I sat around the table, and we hit upon this rule, that we would set aside a four-seat table at Station No. 4, at all times during the meals, for negro [fol. 59] passengers, and for no one else. The balance of the car would be set aside exclusively, at all times, throughout the entire meals, for white passengers.

Now, across from the table set aside exclusively for negroes is the place formerly occupied by what was first called one of the "Jim Crow" tables. That was a two-seat table; but later on it was made a four-seat table in order to meet the demands of the war emergency. There is no table there now, and the Steward has his desk and his locker box; and there is considerable that he uses there. In that way, he can see the middle of the car and can better supervise the entire operation of it.

In setting aside four seats at this one table, exclusively for negroes, the railroad has furnished the negro diner with approximately ten per cent of the space. I believe it was said it was eight per cent of the space. The Commission said it thought that was a fair and equitable distribution of the space.

If Your Honors please, His Honor, Judge Coleman, asked what would be the situation if we set aside the service for one race at a time. We tried that at one time; but, because of the crowds, there was never any leeway. Hence it was that we hit upon the curtain plan.

Judge Soper: What was that? I did not catch the last thing you said.

Mr. Clark: There was never any provision, under the old [fol. 60] rule, whereby we would serve one race at a time in the car, and then serve the other. We did not have a continuous stream of diners. That is why we hit upon the curtain idea, so that we could serve negroes and whites at the same time. But at that time we did not make the table exclusive; and, if the negroes did not come in, the whites sat there. That is what Your Honors found was the infirmity in the prior rule. It now sets aside this table exclusively at all times for negroes.

I would like to make one slight change in that rule as set out in the Commission's report. It refers to white and

colored persons. When Mr. Dixon and I drew up the rule, we put in "negroes" instead of "colored" persons.

Judge Soper: You did what?

Mr. Clark: We put in the word "negroes" instead of "colored persons". But before it was typed in the operating department, they changed the word "negroes" to "colorder persons".

I recall, I think, that it was Judge Soper who asked: who is the colored person? If the rule should be directed to whites and to negroes, I think it was Your Honors' feeling that it should so state. I would like to correct it to the extent of using the word "negroes" in the place of "colored persons". I did not think it was necessary to reopen the case before the Interstate Commerce Commission to make that simple change.

[fol. 61] I take it there is no objection to changing the words "colored persons" to "negroes".

Judge Chesnut: Mr. Clark, there is some argument here to the effect that the accommodations exclusively set aside for negroes are not actually equal to those of the whites. Have you any argument on that? Is there any evidence on it?

Mr. Clark: The evidence is quite to the contrary, Your Honor.

Judge Chesnut: Of course, the same character of meals and menu are served, I suppose.

Mr. Clark: The record shows that identically the same kind of table, the same kind of table cloths, the same kind of silverware, the same kind of check, and the same kind of waiter are served all patrons in the car. There are six stations, which are numbered. The kitchen-end is numbered one, and they run down to the other end of the car to number six. The waiter serving station No. 1 is the oldest and most experienced waiter in the car. He is given that station because it is nearest to the kitchen, and he does not have to carry the meals very far. When he brings them out and serves them, they are more likely to be hot. He is the best waiter on the car. That is the table that is set aside for the negroes.

There has been some reference to the kitchen-end of the car which suggests that it is not so desirable, or that it is [fol. 62] undesirable. That is not so. The kitchen-end of the car takes up quite a space at one end. Then comes the buffet and the little hallway. Then, when you come

to table No. 1, it is approximately in the very middle of the car; and there the riding is much smoother, I am sure Your Honors will recognize, than at either end. There is no question of steam or heat from the kitchen-end. There is nothing to find fault with there. Mr. Thomas, the Superintendent of dining car service, I think it was, testified that the air conditioning apparatus comes down right there in the middle of the car and gives the best results there. So you have identically the same kind of equipment, the same table, the same tableware, the same napkins, etc., the best waiter on the car, the most convenient one to the kitchen, and the smoothest riding place in the car.

Judge Soper: Why do you put up these absurd partitions? They don't conceal anything; they simply call attention of the white passengers to the fact that the colored person is dining there. It seems to me that it is just unnecessary humiliation. You don't put partitions around the passengers who are seated in the Pullman car, do you?

Mr. Clark: In some they do; in some they do not.

Judge Soper: I am talking about the Southern Railway, your railway. Colored people sit in the Pullman, and they sit next door to these sensitive southern white people. [fol. 63] Mr. Clark: I might answer Your Honor's question in two sections.

Judge Soper: I am suggesting to you that these partitions serve no useful purpose whatsoever. They do not conceal anything; and southern white people do sit in a Pullman car, in the parlor car as they used to call it, in seats immediately alongside of colored people, and without any race riots, so far as I know. What is the purpose of that?

Mr. Clark: Let me explain, first, about the partition. We did have a curtain, which was suspended from a pole that went across the back of the table, out even with the aisle. That was referred to in the previous argument,—that the negroes are set aside, that they are closed in. That was one of the very points. They do not want to be segregated.

Judge Soper: I am asking you why you put in the curtains.

Mr. Clark: We put in the partition to overcome, in large measure, we hoped, that criticism that we were hearing.

Judge Soper: I still ask why you put them in. The colored people do not want them.

Mr. Clark: Simply to separate the two races.

Judge Soper: They do not separate them.

Mr. Clark: Yes, sir; they do.

[fol. 64] Judge Soper: They don't separate them in any real sense. When you come into the car you go right by the colored people.

Mr. Clark: Yes.

Judge Soper: And you sit down on the other side of this partition, and you know there are colored people there. It seems to me it is an absurd device that doesn't do anybody any good. If colored people and white people can be in a sleeping car together and sleep next door to each other, and can sit in the Pullman car next to each other, with no partition, what is the common sense of this thing here?

Mr. Clark: The common sense is that we feel it is a separation; that it is certainly far less offensive than the curtain was; it satisfies the white people, and it certainly is much less offensive to the negroes. So put it that way. It may be that, as time goes on, that curtain will become less and less—Well, it is a separation. It has worked satisfactorily. That is the reason why we put up the partition. Of course, if Your Honor suggests that it would be better to have a curtain, we could go back to the curtain.

Judge Soper: It seems to me it is absurd. It doesn't comply with any law. It does not comply with any state law. It is simply a voluntary and an unnecessary thing, and it [fol. 65] is done by the railroad itself. These partitions do not comply with any law, and the curtains do not comply with any law.

Mr. Clark: We find that it best separates them.

Judge Soper: Why don't you separate the people in a Pullman car?

Mr. Clark: I said I would like to answer your question in two ways. That was the first part. That accounts for the partition in lieu of the curtain.

Now, coming to the Pullman, firstly, the Pullman is not before us today. However, when negroes come for space in a Pullman car, they are given space in one of the enclosed compartments,—the drawing room and bedroom compartments. If, perchance, that is not available, they are given space in the body of the car. There is this difference, that those passengers of the negro race who seek sleeping car accommodations, at the increased rate for this service, are very high class representatives of their race, as a rule.

Undoubtedly, when they come in there, they are less likely to create trouble than the helter-skelter, run of mine who might come into the dining car and sit across the table in the dining car. So, Judge Soper, you might say we can get away with that. But one must recognize the situation in the south. You might think: why is it necessary to do this south of the Potomac River but not in the north. But there is that distinction. And we, running the railroads, [fol. 66] try to meet it. And by the segregation we make, we do say that it is the least offensive of their race. We do just enough, you might say, to get by; and it is no reflection on the negro.

Judge Soper: I think it is absurd. If I were a sensitive white person who would not want to eat in the same car with the colored person, I would get no comfort out of this absurd so-called partition, which doesn't do anything except to be an object of segregation; that is all.

Mr. Clark: Suppose I were to ask Your Honor if it satisfies the passenger to have this arrangement,—and it might satisfy the negro passenger sitting across the table from him,—would Your Honor not think we were reasonable in putting it in?

Judge Soper: It might be. But I think people have more sense than you give them credit for.

Mr. Clark: If we could get out of that, it would be a great saving——

Judge Soper: I am sure of that.

Let me ask you one other question. Bearing in mind that it is to the best interests of the southern community and of the railroads to have segregation, and that you have done the best job you can, that is how you feel about it?

Mr. Clark: I certainly say that with the utmost sincerity.

[fol. 67] Judge Soper: I am sure of that.

One thing that is involved is that it is easily possible, especially in these days when colored people have more money and travel more, and are more insistent upon the niceties of life, that the table for colored people would be occupied, and there might be a family or party of more than four come in.

Mr. Clark: That is possible.

Judge Soper: Four would take up this table. But there are seats in the other part of the car that are unoccupied, and another colored man, who is not associated with this other party, comes in, and he can't get a seat, but the white

man who comes in can get a seat. How can you say that is not discrimination?

Mr. Clark: I say it very simply. It is just as fair for one race as it is for the other.

Judge Soper: But it is not just as fair for the one as it is for the other when the greater part of the car is for white people and no colored person can get a seat in it.

Mr. Clark: I am going to answer your question by reversing the order. If there are 44 white passengers dining and the 45th comes in, he stands and awaits his turn. If there are 4 negroes there and a 5th comes in, he stands awaits [fol. 68] his turn. And, more often than not, the white people will be standing, awaiting their table, while the table that is set aside for negroes will not be occupied. That brings up the question of whether or not we have a fair distribution of space. And I remind you that four seats is eight per cent of the capacity of the car, and they are set aside for four per cent of the diners. I think that is extremely fair.

Judge Soper: Where do you get your figures?

Mr. Clark: From an actual check of the records which are kept. The tickets do not show whether they are white people or negroes; but we have to keep a record. That is the result; and that is the finding in the Interstate Commerce Commission's report. You can call it, if you like, temporizing with a troublesome situation. Perhaps that is what it is. You might say that, because we put in these partitions in place of the offensive curt-ins, we have made a mistake. We can go back to the curtains; but I am quite sure that our negro passengers would resent that more. Since we put up the partitions, we have certainly kept down those troubles which we anticipated. Bear in mind this sharp distinction between the sleeping car space and the diner. There is a marked distinction.

Judge Soper: When did that go into effect?

Mr. Clark: From memory I cannot tell you, Your Honor. [fol. 69] But it went into effect just after your decision.

Judge Soper: March 1, 1946?

Mr. Clark: That is the date.

Judge Soper: I rode on a Southern train and sat at one of the colored tables, and there were no colored people there at the time. That was in 1947.

Mr. Clark: And no colored table?

Judge Soper: I sat at the colored table. There were no colored persons at that table. This was in January, 1947.

Mr. Clark: And you sat at the table?

Judge Soper: Yes.

Mr. Clark: The Steward must have been overawed by you and was afraid to tell you to move.

Judge Soper: He didn't know who I was. Why should he know? I sat alongside of a Georgian, and I asked him about the situation. He said: "I don't mind sitting here. A little while ago some white people came in and insisted upon sitting at the table with the colored people, but the conductor wouldn't let them."

Mr. Clark: We have that to contend with.

Judge Soper: He said they were very angry because they were not allowed to sit there.

I asked: "How do you feel about it?"

[fol. 70] He said: "I think it is all nonsense that they have the restriction. I was born and raised in Georgia."

Mr. Clark: And so was I.

Judge Soper: At that time I think what you meant was the enforcement of the old rule, that is to say, that these tables could not be used by white people as long as any colored person was seated at the table; but after the colored person got out, the white people could come in. Why do white people want to object to eating at the same table where a colored person has eaten? How do you answer that?

Mr. Clark: How do I answer that? I would say, frankly, that since this new rule has been in effect, while I have not eaten on the dining car, having been the father of the rule, I watched to see how it worked. I have not found the situation which Your Honor described. The table is kept exclusively for the negroes. If they do not come in, it remains idle throughout the meal, no matter how many white people stand there to be served. There may be cases where a white person will seat himself there and refuse to move. We do not like to have any disturbance. The Steward may say: "All right. Sit there, if you want to." But the rule is,—and it is in the book—not to do that. We certainly try to enforce it.

Judge Chestnut: These are the rules, in similar situations, [fol. 71] which prevail on the Southern Railway and, for instance, the Seaboard, the Atlantic Coast Line, the Louisville

& Nashville, and the Illinois Central, and so on? Is there any standard rule?

Mr. Clark: Their rules are identically like the rule that was before Your Honors in the first case. Whether they have adopted our amended rule, written to reach Your Honor's decision and criticism, I am not entirely clear; but some of counsel with whom I have discussed it have told me that they had recommended the change on their lines. Whether it has actually been put into effect, I do not know.

Judge Chesnut: Is it just by accident or by coincidence that most of these suits have been brought against the Southern?

Mr. Clark: No, Your Honor; that is not true. There are just about as many against the others,—the Atlantic Coast Line and the Seaboard. The Stamps case, which I cited in my brief, was a case against the Louisville & Nashville Railway. As I recall it, when we tried one of these cases recently, there were similar cases against the Louisville & Nashville and the Seaboard that came along. Don't think the Southern is the only one. And, I might say, the Southern Railway is the biggest railroad in the south. We have some 8,000 miles of line; and there is more opportunity for litigation.

[fol. 72] Judge Soper: Maybe you are more truly southern.

Mr. Clark: Well, we are southern. We are trying to do a good job in serving the people we serve.

Judge Soper: Mr. Clark, all of us, of course, have to consider the more recent decisions and these two decisions that have come down. The Covenant Cases and the Morgan case indicate that the present Supreme Court is going to the limit in according privileges to colored people heretofore denied them. I think we have to recognize that tendency. Bearing that in mind, I do have some difficulty in not seeing, when the situation can exist, under your rule, where a colored man and a white man can come into the dining car and the white man can be seated and served but the colored man cannot be seated and served, that there is some discrimination. Take the condition on the bus lines: it would be a very rare thing, probably,—at least it would be somewhat unusual—for a person to get up in the middle of the night and move from one seat to another. But, after

all, that is a rather relatively trivial thing. He goes from one seat to another one which is equally comfortable. That was thought to be sufficient to indicate something that was contrary to law. Now, bearing in mind how narrow that decision was, how can we say that this rule is not discriminatory when it does permit a white person to be served at a time when a colored person cannot be served?

[fol. 73] Mr. Clark: The rule, if Your Honor please, went the other way. It permits the negro to be served while the white person stands.

Judge Soper: I am talking about a case which can happen. You have no more right to deny privileges to white people than you have to colored people. I am saying to you that a situation can exist today when two people can come in, one white and one colored, and the white person can be seated but the colored man cannot. Certainly at that particular juncture he is discriminated against.

Mr. Clark: Your Honor, there is just as much discrimination against the white passenger.

Judge Soper: Then, that is wrong too.

Mr. Clark: I can't agree with you.

Judge Soper: I don't expect you to.

Mr. Clark: The Interstate Commerce Commission is the tribunal to consider the reasonableness of this separation regulation, which has been before it since Report No. 1 of its Reports; and it has come down through the years.

Your Honor speaks of the Morgan case. There the state statute was struck down as a burden on interstate commerce; but the decision, speaking for the Court, very carefully recognized the propriety of a uniform rule and affirmed the Chiles case, which the Supreme Court had decided some years ago.

[fol. 74] "It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel".

That is the decision in the Morgan case, which certainly is a very clear recognition of the right to separate. Until the Supreme Court holds differently, I assume that will be binding on the Interstate Commerce Commission and this Court. So we feel that we are presenting here today a rule which meets Your Honors' criticism.

Judge Soper: I am not suggesting to you that segregation

is not lawful, Mr. Clark. I am assuming now, for the purpose of my question, that segregation has the approval of the Supreme Court and has certainly not been distinctly overruled. And there are a number of flat decisions to that effect, as you have pointed out. What I am suggesting to you is that this is not segregation of the kind that the Supreme Court has placed its approval upon. You could run two dining cars. It would be absurd to do it, I admit.

Mr. Clark: You could run two dining cars.

Judge Soper: If you are so certain that you are going to have racial troubles that you have to maintain such segregation, then, maintain it. I admit that you have, and I gladly assume that you have made the best effort you could to be fair and, at the same time, to be practical with [fol. 75] the railroad's money. You have tried to do all of those things; and I admit it. But the question is, when people are demanding their legal rights, whether you have succeeded.

Mr. Clark: If we have one car seating 44 people and we have another seating 44 and the 45th white passenger comes in to be served in the white car, there may not be a single negro passenger in those 44 seats; and it would be just as much discrimination against that white man who could not be seated as if there were 44 negroes and not a white person.

There must be some rational, reasonable, sensible way to work out a practical situation. And it seems to me that the Interstate Commerce Commission has recognized this. It refers to the DeCuir case, which was affirmed by the Court in the Morgan case, and it said:

> "that in the absence of legislation by Congress a common carrier is at liberty to adopt such reasonable rules and regulations for the separation of white and Negro passengers as seems to it best for the interests of all concerned, and that the test of reasonableness is the established usages, customs, and traditions of the people carried by it, the promotion of their comfort, and the preservation of the public peace and good order."

That is our text book. That is what we have done, and, we hope, sincerely.

[fol. 76] Judge Coleman: Mr. Clark, so far as you know, have you had any complaints from negroes that this table

for four was not adequate, or that they had to wait too long?

Mr. Clark: Oh, yes; we have had some. And we have had complaints from white people that they could not get service. On those two occasions we had 300 passengers and there were six coaches,—three more than usual. That diner is operated between Washington and Greensboro. It arrives at Greensboro at 9:15 p. m. When we got there, there were numerous white passengers who had not been served at all.

Judge Chesnut: That was during the war?

Mr. Clark: Yes, sir.

Judge Coleman: But since the ruling of the Commission, the last ruling?

Mr. Clark: Undoubtedly there have been some complaints. They say it is not enough. They say they do not think we have set aside enough, because, they say, "under your curtain regime, we had the two tables."

Your Honor, we found out that we had too much set aside; so we set up only one; and we did that only after careful investigation.

Judge Soper: You could use that table very readily for white passengers, if you wanted to; but, in order to main-[fol. 77] tain segregation, you can't put a white person across the aisle from the colored person.

Mr. Clark: That answers, I think, why we cut that out.

Judge Soper: Isn't that the reason why you moved the Steward's station?

Mr. Clark: That was one reason, but not the sole reason. We thought it best to have the Steward in the middle of the car, where he would be nearer the coach end.

Judge Soper: I don't know how many decades you have been having the Steward the other way. Has any other railroad done it?

Mr. Clark: I don't know whether they have or not.

Judge Soper: Do any of the northern railroads do it?

Mr. Clark: No, sir.

Judge Soper: Obviously, it is done for segregation purposes.

Mr. Clark: Certainly. There is no question about that. In some of the cars we have since torn out the partition and put in a glass partition, which goes up to the top of the car.

Judge Soper: It would not be transparent, would it?

Mr. Clark: It is very transparent.

Judge Soper: Do you mean to say that you have gone to the extent of putting up a glass partition?

[fol. 78] Mr. Clark: In some of the cars. We are trying everything to keep peace. If they do not like it, we can go back to what it was before.

Are there any questions Your Honors would like to ask?

Judge Coleman: I have none.

Judge Soper: Thank you, Mr. Clark.

Reply Argument of Mr. Belford V. Lawson

Mr. Lawson: I want to clear up some things. Mr. Clark said they tried everything. I recall reading once where a great judge said: Find out what the right thing to do is, and you find out what the law is.

I make no apology for doing what Mr. Dumbald accused me of, about being philosophic. I don't wish to be. I don't know anything about philosophy. I do not wish to be pedantic. But I think there is a lot of truth in that. "Find out what the right thing to do is". That is the first point.

The second point is that they say the Morgan case and the Covenant cases do not apply. I think that is absolutely wrong. I think this Court cannot decide this case except in the light of the expanding tests of these two decisions.

Mr. Clark did not answer your question, and he cannot. That same argument was made in the Supreme Court in the [fol. 79] Covenant Cases, where the petitioner said, "You cannot eliminate these voluntary agreements". Now, specifically, this is what the Court said in the Covenant cases; and it is very pertinent to this case,—talking about the constitutional rights. "The rights established are personal rights"—talking about constitutional rights. "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

This is precisely on the point you are asking about.

Judge Soper: Read it again.

Mr. Lawson: "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny

white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

They were making the point that Mr. Clark just made, that if you do certain things for negroes, it will be discrimination against white people. The Court says that argument does not hold water. They say that no statute is involved here, although this regulation was based upon the statute. They [fol. 80] say it is a voluntary arrangement, an effort on the part of the railway to conform to what they conceive to be the situation.

In the Covenant cases, precisely on that point, the Court said: "Where the enforcement of private agreements,"—— And that is what we have here,—a private matter among the Southern railroads to perpetuate this forbidden segregation. "Where the enforcement of the private agreement would be violative of public policy, it is the obligation of the courts to refrain from such exercise of judicial power."

In other words, they come in here and say: "We have to do these things", and they expect the Commission to sanction them. And the Commission has fulfilled the expectations. And now they expect this Court to sanction and condone, by force of its judicial power, these devices to deprive negroes of equal treatment and facilities.

Judge Coleman: Let me ask you this question. You concede, do you not, that if the Southern Railway put on an extra diner on all of its trains where they use diners, a special diner for colored people exclusively, that would be within the law?

Mr. Lawson: Within the law as it now stands, I would have to concede.

Judge Coleman: Then, let's suppose that, having determined the percentage of colored diners they had, that they [fol. 81] use a very small colored dining car, with only one table in it. That may sound like a rather fanciful assumption, but it would be possible—a small diner, with the kitchen equipment and service, and bill of fare, and everything identical with the large diner, except that it was reduced to the percentage basis which they figured and which the Commission has figured in this case, and that the needs of that percentage would be met by one table. Now, do you consider that there is any more discrimination in giving this

one table in the white diner than in giving one table in the exclusively colored diner?

Mr. Lawson: Yes, if Your Honor please, for several reasons. If that one table were put in the middle of the car, or at the other end of the car away from the kitchen and away from the noise and the Steward, then I think your analogy would be perfect. But, if Your Honor please, may I say this? Mr. Clark says this end of the car rides easier and that it is better, and all that sort of thing. Why, then, do they always put the negroes at the kitchen? Why don't they put this "Jim Crow" table in the middle of the car? The can't answer it. I submit, whether they admit it or not, that it is common knowledge that, with that Steward sitting directly opposite this table, and the waiters passing, and with the heat and shut door and the absence of free circulation, it does not meet the requirements of the law. So [fol. 82] they can't answer the question.

Now, to come back to Judge Coleman's question, I think there is another reason which I would like to give, which has been hinted at here several times. The "Jim Crow" table, in the analogy which you gave, cuts off what I think is fundamental,—the freedom of choice. I think that is different from absolute segregation.

Certainly I will not go any further off the record than they did, because Mr. Clark did not make any reply argument, but he made a very fine argument,—an old argument about the love for the negro people. I am not going that far.

Not long ago I went into a diner with my wife, who happens to be light-skinned, and they wouldn't seat me. I had to explain. They wanted my marriage certificate. And there is a lawsuit pending. That is the absurdity of the situation to which this goes.

Judge Coleman: That would apply in the analogy I raised; wouldn't it?

Mr. Lawson: It cuts off my freedom of choice and association. I have a right to associate,—the same as white people,—with my wife in a dining car. We pay the same price in the diner that white people pay, but the white people are seated any place in the car, in the middle or anywhere else. They say: "You must sit up there, [fol. 83] whether you like it or not".

Again, there is freedom of choice for the white people that the negroes do not have. And I think that is different from segregation. I think it is a property right. When these railroads come in and restrict that liberty of locomotion and rights of association and choice, they cut off due process, and they deny that protection of the law. They have the right, but they haven't the right, as said in the Covenant Cases, to expect agencies of the Federal Government to sanction and condone and buttress it.

Now, there are two other things that I want to point out. I am appalled at certain types of argument made here. The walls of Jericho are tumbling down, whether or not we like it. It is not a fact that the people in the south want to keep up this custom.

Take, for example, the overwhelming majority of the law students here in Oklahoma. The white students objected to letting this colored girl be admitted to the law school. The same was true at Missouri. Southern white people in 1948, 178 years after the founding of our nation, want to perpetuate this "Jim Crow" situation.

I make no apology for being reminded of what a great judge like Mr. Justice Holmes says in this case, and I realize it must be by slow movement. I submit the Morgan case and the Covenant Cases, and this Court's decision in [fol. 84] this case, in its formal decision, are moving in the right direction. You would be surprised at the tremendous good this decision has done. They move the Steward off into this corner; they cut it off, they rope it off, and they embarrass us. They deprive us of our right of choice and association.

I submit that if the Southern Railway had the courage to do what this Court has suggested, and eliminate all of this foolishness, the situation would be identical with what it is in the case of the Pullman. There are only a few individuals who stand in the way of the progress of democracy in this case. It was amply illustrated by the courage of Mr. Justice Edgerton, who said this was wrong, and the Supreme Court unanimously agreed.

When these people come in here and say, "We are afraid of the prejudice of the people",—Of course, they have the right to their prejudices. But our argument is that agencies of the Government and the courts have no right to sanction and encourage it.

Now, one final reference to the Morgan case to show what I think is an attempt on the part of the Supreme Court to tear down these walls of segregation. Mr. Justice Reed says, and I quote: "There is need for national uniformity in the regulations for interstate traffic".

That statement is not taken out of its text. They had [fol. 85] decided the case when he said that; and he was making the point generally that in buss transportation interstate, in interstate boat transportation, in interstate railroad transportation and, I think, in interstate dining car transportation, there must be national uniformity in the regulations. So I think these two cases certainly do conform.

Now, one final thing. These carriers, as I understand it, are sort of depositories of state power, even if we do say they cannot do certain things. On the other hand, they are free to do certain things. One thing they cannot do is to expect agencies of the Government to enforce these voluntary agreements.

One point that I overlooked making in my main argument was this. Mr. Clark wants to change "colored person" to "negro". Even if the regulation said "negro", you would have the same question of determining who is a negro and who is colored. So I don't think the word "negro" adds anything to it.

There is one thing I might point out to you,—these statistics that they brought in, talking about the volume of traffic. In the first place, the Supreme Court, in the Mitchell case, said that volume had nothing to do with it. But, even if you consider it, and even realizing that the Interstate Commerce Commission is not bound by technical [fol. 86] rules of evidence, they brought in a steward by the name of Thomas and just submitted some evidence. And I must repeat to you just a few sentences to show that it is inadmissible. I do not mean to be technical, but I make the point that there wasn't before the Commission the kind of facts adequate.

"Mr. Thomas, did you yourself compile this record?

"A. It was under my supervision. Each steward, as he went out, was told to give his record——"

This is the fifth volume.

"But you yourself did not make any part of the record?"

He hedges. "I supervised the making of the record.

"Are you testifying from any original notes", he was asked, and he said, "Oh, no".

"Who compiled this work?

"A. It is compiled by my office force."

He was asked: "What steward turned in the record as indicated?

"A. The various stewards.

"Q. What were their names?

"A. I don't know.

"Q. Is that true of all these reports?

"A. That is correct.

[fol. 87] "Q. Calling your attention to exhibit No. 9, that same is true?

"A. That same is true."

Finally, he comes out and says this:

"Q. I mean do you know of your own personal knowledge the method of compilation of these reports and their accuracy?

"A. I don't know.

"Q. And you yourself have no personal knowledge?

"A. I was not in the car and I couldn't possibly."

I submit the Commission should not have countenance that sort of evidence. It is certainly inadmissible.

Judge Chesnut: Have you any contrary evidence?

Mr. Lawson: No; I have no contrary evidence. Realizing that it has nothing to do with it, there is not so much that I can say about it now. It is my job to travel a lot. It is common knowledge that there are four negroes on these trains. The common practice now on these crack trains, these long trains, is to have 8 to 10 negroes.

There is this situation, that, as I say, this regulation is worse than the other one. Admittedly, this fifth negro man has to wait. I submit it is contrary to everything we have had so far.

In conclusion, I simply want to say one thing. And, again, [fol. 88] I make no apology. I think the Morgan case, the Covenant cases, and this Court's decision bear out the truth of it. Mr. Justice Cordozo says in his little book, "The Growth of the Law", at page 71: "What we seek is not justice under the law as it is; what we seek is the kind of justice to which law in its making should conform."

I submit that we, here in this Court today, are making the law, just as the decision of this Court made law before. This is not just another lawsuit. This is a historic case, just as were the Morgan case and the Covenant Cases, because we are arriving at the kind of justice, as law, that goes into the books, namely, christianity and democracy.

Finally, the reason I say the kind of argument that has been made here today is appalling is that it plays right into the hands of subversive forces. The kind of argument that these gentlemen made, with all due respect to them, plays right into the hands of Communism. The antidote to Communism is the practice of christianity and democracy.

Judge Soper: Gentlemen, we will take the matter under consideration.

(Whereupon, at 12 o'clock noon, the Court adjourned.)

[fol. 89-90] REPORTER'S CERTIFICATE

I certify that the foregoing is a true and correct transcript of the proceedings in the above case.

Ray Farrell, Official Reporter.

[fol. 91] **Offer in Evidence**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 2455

ELMER W. HENDERSON, 2560 McCullough Street, Baltimore, Md., Plaintiff

vs.

INTERSTATE COMMERCE COMMISSION, Washington, D. C.,

and

THE UNITED STATES OF AMERICA, Defendants

COMPLAINT TO ENJOIN, SUSPEND AND SET ASIDE ORDER OF INTERSTATE COMMERCE COMMISSION—Filed January 26, 1945

I

The jurisdiction of the Court is in Title 28, U. S. Code, Sec. 41, paragraph 28 and Sections 43-48; Title 49 U. S. Code, Section 17, paragraph 9.

II

The plaintiff is a citizen of the United States and a resident of the State of Maryland and is employed by the United States Government.

III

This suit is brought against the Interstate Commerce Commission to enjoin, suspend, set aside and annul the order of the Commission dated September 18, 1944 denying the plaintiff's petition for an order commanding the Southern Railway System to cease and desist from its violations of Title 49, U. S. Code, Sections 3 and 4, paragraph 1; Title 8, U. S. Code, Ch. 3, Sec. 41, 14th Amendment, U. S. Constitution, Secs. 1 and 3, Article IV of U. S. Constitution, Secs. 1 and 2, as a result of which the plaintiff was subjected to undue and unreasonable disadvantage and prejudice and was denied full and equal benefit and protection of the laws of the United States and was deprived of his rights, privileges and immunities as a citizen of the United States traveling in interstate commerce.

[fol. 92]

IV

The Southern Railway System is a railroad corporation organized under the laws of the Commonwealth of Virginia and is a common carrier engaged in the transportation of persons and property by railroad in interstate commerce, between the District of Columbia and points in the State of Virginia, North Carolina, South Carolina, Georgia, and others, and was so engaged as such common carrier at the time of the grievance hereinafter stated as having been suffered by the plaintiff from the acts of the Southern Railway System; that at the time of said grievances, the Southern Railway System was, for many years prior thereto had been, and is now engaged in interstate commerce and is subject to the provisions of the Interstate Commerce Act and its supplements.

V

History of Proceedings

The plaintiff, a Negro, purchased a first-class ticket on the Southern Railway System, together with a Pullman reservation to Atlanta, Ga. On May 17, 1942, he presented the

ticket and Pullman reservation aforesaid and, in exercise of the contractual rights pursuant thereto, boarded a southbound train in Washington, D. C. at 2:00 P. M. At about 5:25 P. M. on said date, the plaintiff went to the diner attached to said train for dinner. On said diner, two tables, separated by curtains, were reserved for Negro passengers. When plaintiff entered the diner, notwithstanding the reservation for Negro passengers provided, several seats at the aforesaid tables were in use by white passengers, but there were vacant seats. In this circumstance the plaintiff was advised by the dining car steward to return to his seat in the Pullman and wait until notified when he could be served. Thereafter the plaintiff did so but was not notified. The plaintiff thereafter returned to the diner and found that there were still white passengers at the tables reserved for colored passengers but there were also empty seats at those tables. The plaintiff demanded [fol. 93] to be seated and served, whereupon the said steward refused, but offered to serve the plaintiff at his Pullman seat or, in the alternative, offered to serve him in the dining car later when all the white passengers had left the dining car or when all the seats at the tables reserved for colored passengers were vacant. The plaintiff returned to his seat and waited approximately half an hour and then returned to the diner. White passengers were being served in all parts of the car, and interspersed were empty tables and vacant seats. The plaintiff was again refused service. The diner was taken off the train in Greensboro, N. C. and the plaintiff was never served.

VI

The failure of the railroad to seat and serve the plaintiff was unjust, unlawful, disadvantageous, unreasonable, discriminatory, and in violation of the national transportation policy as set forth by the Congress in U. S. C. A., Title 49, notes preceding Sections 1, 30, and 901, in that the railroad failed to provide plaintiff "fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each",

VII

The railroad violated Section 3, paragraph 1 of Title 49, U. S. C. in that it practised undue and unreasonable preference and disadvantage against the plaintiff and subjected him to undue and unreasonable prejudice and disadvantage by (1) refusing to serve him, (2) by providing unequal, insufficient tables and dining car service in the dining car, (3) by the impractical, humiliating, discriminating and unfair use of a curtain around the tables allegedly reserved for Negroes, and (4) by giving unlawful, discriminatory and unnecessary preference and advantage to certain white persons, whose names are unknown to this plaintiff, in respect to transportation and facilities in that it failed [fol. 94] and refused to serve the plaintiff at tables in the dining car where there were empty seats, which tables and seats were reserved for Negroes but which were allowed to be used by white passengers.

VIII

The railroad violated Section 41, Chapter 3, Title 8, U. S. C. in that it denied the plaintiff the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

IX

The railroad violated Section 43, Chapter 3, Title 8, U. S. C. in that it denied and deprived the plaintiff of his rights and privileges and immunities as a citizen of the United States as guaranteed by Sections 1 and 3 of the 14th Amendment to the U. S. Constitution.

X

The railroad violated Section 1 of paragraph 4 of Title 49 of the U. S. C. in that it failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation.

XI

The railroad violated Clauses 1 and 2, Section 2 of Article IV of the U. S. Constitution in that it denied the plaintiff the privileges and immunities to which he was

and is entitled as a citizen of the United States, any laws of any State through or in which the grievances herein complained of occurred to the contrary notwithstanding.

XII

By reason of the facts stated above the plaintiff was greatly embarrassed and humiliated, had to forego his meal, was denied the facilities and advantages provided by the [fol. 95] railroad for other passengers, and was compelled to hire counsel to seek the enforcement of his rights.

XIII

That on June 17, 1943 the proposed report of the examiner of the Interstate Commerce Commission found that the violations of the Southern Railway System were discriminatory and prejudicial against the plaintiff but dismissed the complaint.

XIV

That on June 30, 1943 the plaintiff filed exceptions to the examiner's proposed report and argued the issues orally before Division 2 of the Commission. On May 13, 1944 Division 2 found that the railroad's act was discriminatory but dismissed the complaint, as shown by plaintiff's Exhibit A.

XV

That on July 13, 1944 the plaintiff filed a petition for further hearing before the full Commission and on September 18, 1944 the full Commission dismissed said petition.

Wherefore, the plaintiff prays:

1. That the Court find that the refusal of the Interstate Commerce Commission to issue an order to the Southern Railway System to cease and desist the violations aforesaid is erroneous and is in contravention of the rights of the plaintiff.

2. That this Court issue herein a preliminary injunction suspending or restraining the enforcement of, and setting aside the order of the Interstate Commerce Commission, dated September 18, 1944, dismissing the plaintiff's petition.

3. That upon final hearing of this cause, a final decree be entered setting aside the order entered in Docket #28895 of the Interstate Commerce Commission.

[fols. 96-101] 4. That the plaintiff have such other and further relief as the nature of the case may require and to the Court may seem just and proper.

Lawson, McKenzie & Windsor,, by B. V. Lawson, Jr., 2001 11th St., N. W. — 1, Attorneys for Plaintiff. Josiah M. Henry, Jr., 22 St. Paul Street, Baltimore, Md.

Duly sworn to by Belford V. Lawson, Jr. Jurat omitted in printing.

CERTIFICATE OF SERVICE

Copies of the above Complaint and Attached Exhibit A served by registered mail on the U. S. Attorney General, Department of Justice, Washington, D. C. and Interstate Commerce Commission, Washington 25, D. C. the 25 day of January, 1945.

B. V. Lawson, Jr.

Service of a copy of the above Complaint and Attached Exhibit A acknowledged this 25th day of January, 1945.

Bernard J. Flynn, United States Attorney for the District of Maryland.

[fol. 102] IN UNITED STATES DISTRICT COURT

Civil Action No. 2455

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 30, 1945

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereunto or unto so much or such parts thereof as it is

advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I and II of the complaint, the Commission admits jurisdiction of the Court of the action herein and venue of the parties thereto.

II

Answering the allegations of paragraph III and the unnumbered paragraph between paragraphs III and IV of the complaint, the Commission admits that the order of the Commission dated September 18, 1944, is an order which denies plaintiff's petition for reconsideration and rehearing of the order entered May 13, 1944, together with the report of Division 2, entered the same date, and that these reports and orders were entered in a proceeding [fol. 103] instituted by the plaintiff herein upon a complaint against the Southern Railway Company, a corporation, as defendant, and that plaintiff has the legal right to maintain the action herein, and that the Southern Railway Company is a common carrier, operating in and through the States of Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and other states, and is subject to the provisions of the Interstate Commerce Act.

III

The Commission alleges that the allegations contained in paragraphs VIII, IX, and XI of the complaint are immaterial, irrelevant, and relate to matters not within the jurisdiction of the Commission to decide, and that such matters have not here been decided and that such matters do not relate to the Interstate Commerce Act or to the order or orders or reports which the complaint herein seeks to annul, and that such matters do not relate to or come within the jurisdiction of the statutory court as provided for by law, 25 U. S. C. 41, 43, 45, 45a, 46, 47, 47a, and 48, because of which the said allegations should not be considered by this Court.

IV

The Commission denies the implied allegations of the complaint that plaintiff sustained damage or injury by

reason of the report, decision, or orders of the Commission, entered in these proceedings.

V

Further answering other allegations of the complaint, the Commission alleges that proceedings involved in this action were instituted upon the filing of a complaint by the plaintiff herein with the Commission on October 10, 1942, seeking an order against the defendant, the Southern Railway Company, requiring said defendant to cease and desist violations of the Act, alleged to have been committed by said defendant, in respect to equal and just dining car facilities for Negro interstate passengers, more particularly to discontinue the use of curtains around tables [fol. 104] reserved for Negroes, and the award of damages, attorney's fees and costs, alleged to have been incurred or sustained by the said complainant; that thereafter said complaint was made the subject of hearing held at Washington, D. C., February 24, 1943, under Docket No. 28895, at which hearing evidence was submitted by the parties in interest, including plaintiff herein, following which the examiner submitted his recommended report dated May 28, 1943, to which exceptions were filed by said complainant, plaintiff herein; that following submission of briefs, including brief in behalf of complainant, and oral argument by counsel for the several parties in interest, including complainant, Division 2 of the Commission entered its report and order of May 14, 1944, wherein it was decided that the complainant, plaintiff herein, had been subjected to undue and unreasonable prejudice and disadvantage as a result of a casual incident, and because of bad judgment on the part of an employee on the defendant railroad, and over-crowding of trains due to war conditions, and not because of general practices or rules of defendant, which were held adequate to avoid in the future any inequality of treatment as between Negroes and other passengers seeking dining-car service, for which no order for the future would serve a useful purpose; and that complainant had not sustained any damage in consequence of the violation of Part I of the Interstate Commerce Act, on the basis of which an award of reparation could be made and for such reasons dismissed the complaint; and that complainant filed a petition for reconsideration and further hearing on July

12, 1944, which was denied by the Commission at a general session, by order entered September 18, 1944.

VI

The Commission further alleges that the findings and conclusions in said report of May 13, 1944, were entered after a full and fair hearing, were and are, and that each of them was and is, fully supported and justified by the [fol. 105] evidence submitted in said proceedings as aforesaid, and that, in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the said proceedings by their respective counsel.

The Commission further alleges that said report and orders, above referred to, were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them, that in making said report and orders the Commission did not exceed the authority conferred upon it by law, and denies each of and all of the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all of the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in the said report of May 13, 1944, above referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by Allen Crenshaw, Attorney; E. M. Reidy, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of counsel.

[fols. 106-108] *Duly sworn to by Charles D. Mahaffie. Jurat omitted in printing.*

[fol. 109] IN UNITED STATES DISTRICT COURT

Civil Action No. 2455

[Title omitted]

AMENDMENT TO ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed May 9, 1945

Comes the defendant Interstate Commerce Commission, and by leave of Court, amends its answer heretofore filed in the above action, as follows:

Second Defense

1. Allegations of the answer heretofore filed are adopted and by reference made a part of this amendment.

2. Answering allegations of paragraphs XII and XIII of the complaint, or the implications thereof, if such there be, or as may appear or be implied by other allegations of the complaint, the Commission alleges that this Court is without authority to consider any claim for damages or reparation, because of the preference, prejudice and disadvantage found by the Commission, since claim therefor was filed with and denied by the Commission, prior to the bringing of this action. (Section 9, Interstate Commerce Act, 49 U. S. C. 9).

Interstate Commerce Commission, by E. M. Reidy, Assistant Chief Counsel; Allen Crenshaw, Attorney. Daniel W. Knowlton, Chief Counsel, of counsel.

[fol. 110] IN UNITED STATES DISTRICT COURT

Civil Action No. 2455

[Title omitted]

ANSWER OF INTERVENING DEFENDANT—Filed May 10, 1945

Comes now Southern Railway Company, intervening defendant herein, and, with leave of court first had and obtained, files this its answer to the complaint herein.

This intervening defendant hereby adopts the answer, as amended, herein filed on behalf of the Interstate Commerce Commission, a defendant in this cause, in the same

manner and to the same extent as though each paragraph thereof were herein fully set out.

Wherefore, having answered, this intervening defendant prays that the complaint herein be dismissed at the cost of the plaintiff.

Charles Clark, A. J. Dixon, Attorneys for Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

[fol. 111] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

No. 2455, Civil Docket

ELMER W. HENDERSON, Plaintiff

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants

Argued September 24, 1945 Decided Dec. 17, 1945

We concur: Morris A. Soper, U. S. Circuit Judge; W. Calvin Chesnut, U. S. District Judge.

Before Soper, Circuit Judge, and Coleman and Chesnut, District Judges

OPINION OF THE COURT—Filed December 17, 1945

COLEMAN, *District Judge:*

This is a suit under the provisions of 28 U. S. C. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), whereby the plaintiff seeks to set aside an order of the Interstate Commerce Commission, entered May 13, 1944, with respect to dining car service on the Southern Railway.

On October 10th, 1942, the plaintiff filed a complaint with the Commission alleging (as amended at the original hearing) that the Southern Railway, on May 17th, 1942, had, with respect to its dining car service, unjustly discriminated against him in violation of the provisions of Section 3(1) of the Interstate Commerce Act (49 U. S. C. A. sec. 3(1)), and Section 2, Par. 1 of Article IV of the Constitution of the United States, by failing to furnish him dining car service equal to that furnished white passengers.

The complaint prayed that the Commission require the carrier to cease and desist from the alleged discrimination; in the future to afford complainant and other interested Negro passengers dining car facilities and such other services and facilities as the Commission might deem reasonable and just, equal to those accorded its white passengers, and asked also for damages to be assessed against the carrier because of the alleged discrimination.

The Southern Railway answered the complaint, denying that it had violated any Constitutional provision or any provision of the Interstate Commerce Act or of any other law. The complaint, according to the usual procedure, was referred by the Commission to an examiner for the purpose of conducting a hearing, which was held on February 24th, 1943. At this hearing, complainant alone testified [fol. 112] in his own behalf and six witnesses were heard for the railroad.

The examiner filed his report on May 28th, 1943, recommending that the Commission should find that complainant had been subjected to unjust discrimination and prejudice, but that the situation had been corrected for the future and that, therefore, the complaint should be dismissed. Complainant excepted to the examiner's report, alleging that the Virginia segregation statute (Virginia Code 1942 (Michie), Secs. 3962-68), upon which the examiner relied in part, was inapplicable; that segregation of races is contrary to the Federal Constitution and the Interstate Commerce Act; that damages should be assessed, and that the alleged discrimination and prejudice had not been corrected for the future. Thereupon, the complainant was granted a hearing before Division #2 of the Commission, briefs were filed and oral arguments submitted, and on May 13th, 1944, that Division filed its report (258 I. C. C. 413), making detailed findings of fact and conclusions based thereon, all of which are substantially in accord with the examiner's report and recommendations.

The material facts as found by the Commission and set forth in its report, are not disputed by the parties in the present proceeding, and are as follows: On May 17th, 1942, the complainant, a Negro, citizen of the United States, left Washington at approximately 2 P.M. aboard the Southern Railway's Train #35, for Atlanta, Ga., traveling as a first class Pullman passenger. The train consisted of 1 combination baggage-passenger car, 6 coaches, 2 Pullman

cars and 1 dining car with seats for 36 persons. It carried approximately 300 passengers, about 100 more than the usual number, which necessitated the use of 3 extra coaches. The Pullman cars were in the rear of the dining car, thus making it necessary for Pullman passengers desiring dining car service to enter the diner alongside the kitchen of the dining car. From this end the tables on the left side of the diner accom-odated 4 persons and those on the right side, 2 persons. The diner was equipped with curtains which, when drawn, separated the two tables nearest the [fol. 113] kitchen from the other tables, these curtains extending, when drawn, from the sides of the diner to but not across its center aisle, nor along the aisle side of either of these end tables.

When the diner was opened about 5:30 P.M. on May 17th, 1942, and as the train was proceeding through the State of Virginia, a number of passengers were waiting to enter. It filled promptly. When all tables other than the two tables at the kitchen end of the car had been occupied, no Negro passenger having appeared, white passengers were seated at the end tables. Some of the passengers who were in line when the diner was opened, remained standing when the car was filled. Complainant did not take a position in the line but walked past people who were waiting to be served in turn. At least one seat at one of the end tables at the kitchen end of the diner was empty when complainant first demanded service but neither then nor later was either of these end tables entirely vacant. The diner was filled continuously, passengers from the line taking seats as soon as others vacated them, and from time to time diner patrons were served dinner until it became necessary to decline further service, in order that the car would be clear of patrons when the train reached Greensboro, North Carolina. Complainant was tendered and declined service in his Pullman car space without charge therefor in addition to the regular dining car prices. The service offered him differed from that furnished in the dining car only as respects the place of service. The steward did not send for complainant as he had promised to do because at no time during the meal period was there available space in which complainant could be served in the diner in a compartment separated from tables that were occupied by white passengers. Complainant was one of

many passengers who sought dining car service and who had not been served when the car was removed from the train at approximately 9:00 P.M.

For many years, it was defendant's practice to serve meals to passengers of different races at different times. Negro passengers, being in the minority, were served either [fol. 114] before or after the white passengers had eaten. The increase in passenger traffic in 1941, due to defense activities, made necessary some plan whereby both races could be accom-odated at the same time. It was found that the length of time required for serving white passengers would extend into the time for the next meal, leaving no time in which to serve Negro passengers. The installation of curtains was designed to correct that situation. Since the time of complainant's journey, defendant's dining cars have been equipped with 4-seat tables on both sides, thereby increasing to 48 the capacity of the car, and to 8 the number of seats at the end tables.

In July, 1941, defendant issued to its passenger department employees a circular of instructions concerning accomodations for passengers of different races, which contains the following:

"Dining Car Regulations

"Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

On August 6, 1942, these instructions were supplemented as follows:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

[fol. 115] "After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"'Reserved' cards are being supplied you."

As passengers enter the dining car when it is opened for meal service, it is defendant's practice to seat some of them at each waiter's "station", or group of tables, so that all the waiters may be engaged promptly and service expedited. If any Negro passengers are present, they are seated and served at the end tables. Relatively few Negro passengers use the dining car, and for that reason the end tables are not absolutely reserved for their exclusive use; but white passengers are not seated at them until the other tables are filled. Then, if no Negro passengers present themselves, the end tables are used for white passengers. If a Negro passenger requests service when both end tables are fully or partially occupied by white patrons, the practice is to offer him service in his Pullman space or at his coach seat, using a portable table, without the extra charge usually made for that service. When so served, the passenger receives the same food and waiter service that is furnished dining car patrons, and the dishes, silverware, and linens are those used in the dining car. Negro civilians are served in the dining car simultaneously with white passengers only at the end tables. White and Negro soldiers are served together, without distinction.

On these facts the Commission made three ultimate findings, (1): That defendant's treatment of complainant with respect to dining car service subjected him to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act; but that (2): The defendant's dining car rules and regulations in effect at the time in question, when considered with defendant's supplementary rules and regulations issued on August 6th, 1942, are adequate, and therefore no order in respect to these rules was necessary for the future; and (3): That com-

[fol. 116] plainant had sustained no compensable damage

as a result of the disadvantage caused him by defendant. Accordingly, the Commission issued its order on May 13, 1944, dismissing the complaint. Thereafter, complainant petitioned for a hearing before the full Commission, but this was denied by order entered September 18, 1944 and on January 26, 1945, the present proceeding was instituted. In the complaint it is alleged that the treatment given the complainant with respect to dining car service violated (1) Section 3(1) of the Interstate Commerce Act (49 U. S. C. A. Sec. 3(1); (2) the national transportation policy as defined in that Act (49 U. S. C. A. Sec. 1, note); and (3) the Civil Rights Act, 8 U. S. C. A. Sec. 41, 43, enforcing Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The specific form of injunctive relief sought is that the Commission order the Southern Railway Company to cease and desist from the form of treatment with respect to dining car service given the complainant, and to establish and enforce in the future, for the benefit of complainant and other Negro passengers, dining car facilities and services unconditionally identical with those established and enforced for white passengers, including the discontinuance of the Railway Company's present practice of using curtains around dining car tables provided for Negro passengers. The complainant concedes that the Commission's denial of damages is not reviewable by this Court. See Standard Oil Co. v. U. S., 283 U. S. 235; George Allison & Co. v. United States, 296 U. S. 546; Ashland Coal & Ice Co. v. United States, Fed. (2d) affirmed per curiam — U. S. —.

For a proper understanding of what the Commission decided apart from the matter of damages, we quote the following from its opinion (258 I.C.C. 413, at page 418-419):

"The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate passengers. See Chiles v. Chesapeake & O. Ry. Co., 218 U. S. 71, and cases therein cited. Section 3(1) of the [fol. 117] act provides that it shall be unlawful for any common carrier subject thereto to m e, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prej-

udice or disadvantage in any respect whatsoever. In Mitchell v. United States, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus it is seen that substantial equality of treatment only is required of the carrier.

"It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

"As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

[fol. 118] "We find that complainant was subjected to undue and unreasonable prejudice and disadvantage in the respect already stated. As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose."

The questions presented for our determination in this proceeding are basically two, as evidenced by complainant's contentions, and may be summarized as follows: (1) Is any form of racial segregation of interstate passengers in dining cars a preference, prejudice or discrimination in and

of itself in violation of the Civil Rights Act, or the Interstate Commerce Act, or both; and (2) even if a certain degree of such segregation be valid, are the present rules and regulations of defendant respecting its dining car service nevertheless invalid because they do not provide substantial equality of treatment in that (a) curtained tables are required for Negroes and not for white; and (b) service at such tables may be refused even though there be empty seats at such tables?

The position of the Interstate Commerce Commission is that (1) although it has found that in the particular instance complainant had been subjected to undue and unreasonable prejudice and disadvantage, it further found that such was the result of a casual incident and not of the Railroad's general practice, and therefore the entry of an order for the future would serve no useful purpose, and the decision of the Commission in this respect being founded upon a rational basis, should not be disturbed; and (2) to order the Commission to require the railroad to do more would be, in effect, to order that segregation cease, whereas neither the Commission nor this Court has jurisdiction in the present proceeding to determine whether or not segregation in and of itself is a discrimination forbidden by the Constitution, the Interstate Commerce Act, or any other Federal statute.

The Southern Railway, as intervening defendant, contends that the finding that its existing rules are adequate, is a determination of fact within the exclusive jurisdiction of the Commission, and therefore may not be upset by this Court.

[fol. 119] The Government has not seen fit to be represented separately and to take part in any phase of this litigation from its inception, as it has the statutory right to do. This, however, does not foreclose the intervening defendant, the Southern Railway, from challenging the action of the Commission. Interstate Commerce Commission v. Oregon-Washington Railroad Co., 288 U. S. 14.

At the outset we must determine whether there is any merit in the jurisdictional question raised by the Commission, namely, that this Court may not alter the Commission's finding of equality of treatment since that is a determination of fact exclusively within the jurisdiction of the Commission.

The Commission's position, it will be seen, is tantamount

to saying that in a case of this kind judicial review of the Commission's action is completely foreclosed, even as respects the question of whether it may have exceeded its statutory or constitutional authority in entering a particular order. We do not understand that such is the law. The Supreme Court said in Rochester Telephone Corp. v. United States, 307 U. S. 125, 139, that two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission have been evolved. "One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. *Only questions affecting constitutional power, statutory authority, and the basic pre-requisites of proof can be raised.* If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Comm'n. v. Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Comm'n v. Union Pacific R. Co., 222 U. S. 541." (Italics inserted).

The complainant is directly asserting in this proceeding that to allow the Commission's order here under review to [fol. 120] stand, would be tantamount to approving a rule or practice on the part of the Southern Railway that is violative of complainant's constitutional rights and not within the statutory power of the Interstate Commerce Commission to approve, so we are called upon not merely to review the correctness of a factual situation upon which the Commission has ruled, in a field exclusively within its province,—as for example, one involving rates or other charges by an interstate carrier,—but to rule upon questions, the determination of which has not been, and cannot be exclusively delegated to any administrative body, but must remain subject to judicial review. The fact that the Commission's order is negative in form, i.e., that it dismissed the complaint, makes no difference. Rochester Telephone Corporation v. United States, supra; Mitchell v. United States, 313 U. S. 80.

We turn then to a consideration of the first of complainant's two basic contentions: namely, that any form of racial segregation of interstate passengers in dining cars

should be declared to be, in and of itself, a form of discrimination forbidden by the Federal Constitution and the Interstate Commerce Act.

We must at the very outset recognize the distinction between segregation and equality of treatment. The equal rights clause of the Constitution, Article IV, Section 2, does not import that a citizen of one State carries with him into another State any fundamental privileges or immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but simply that in any State, every citizen of every other State shall have the privileges and immunities which the citizens of that State enjoy. In short, this provision merely prevents a State from discriminating against citizens of other States in favor of its own citizens. Downham v. Alexandria Council, 10 Wall. 173; Chambers v. Baltimore & Ohio R. R. Co., 207 U. S. 142; LaTourette v. McMaster, 248 U. S. 465; Chalker v. Birmingham & N.W. Rwy. Co., 249 U. S. 522; Shaffer v. Carter, 252 U. S. 37; United States v. Wheeler 254 U. S. 281; Douglas v. New York, New Haven and Hartford Ry. Co., 279 U. S. 377; Whitfield v. Ohio, 297 U. S. [fol. 121] 431; Hague v. C. I. O., 307 U. S. 496. Similarly, the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment. The Slaughterhouse Cases, 16 Wall. 36. And it has been repeatedly declared by the Supreme Court that race segregation by State law is not per se an abridgement of any constitutional right secured to the citizen. See Plessy v. Ferguson, 163 U. S. 537; McCabe v. Atchison T. & S. F. Ry. Co., 235 U. S. 151; Missouri ex rel. Gaines v. Canada, 305 U. S. 337. By virtue of the Commerce Clause of the Constitution, Congress might legislate specifically with respect to segregation in interstate travel; but Congress has not done so. However, Section 3, paragraph 1 of the Interstate Commerce Act makes it unlawful to subject any person in interstate commerce to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and this prohibition clearly embraces the matter of dining car facilities, just as seating, sleeping or any other facilities in interstate commerce. Stamps v. Chicago R. I. & P. Ry. Co., 253 I. C. C. 557; LeFlore & Crishon v. Gulf, M. & O. R.R. Co., 262 I. C. C. 403; Barnett v. Texas & P. Ry. Co., — I. C. C. —. Furthermore, the right to a particular accom-odation or facility does not depend upon the volume of

traffic, because although the supply of particular accom-odations or facilities may be conditioned upon there being a reasonable demand therefor, if such accom-odations or facilities are in fact provided, substantial equality of treatment of persons traveling under like conditions cannot lawfully be withheld. Mitchell v. United States, supra. Thus, while inaction of Congress as respects segregation in interstate travel is equivalent to a declaration that interstate carriers can separate Negro and white passengers, they may do so only if they afford substantial equality of treatment to members of both races when traveling under like conditions. Hall v. deCuir, 95 U. S. 485; Louisville etc. Railway Co. v. Mississippi, 133 U. S. 587; Plessy v. Ferguson, supra; Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388; Chiles v. C. & O. Ry. Co., 218 U. S. 71; McCabe v. Atchison T. & S. F. Ry. Co., supra. Therefore, although the Supreme [fol. 122] Court of Appeals of Virginia has held, since the Commission decided the present case, in Morgan v. Commonwealth, 34 S.E. (2d) 491, that the Virginia segregation laws with respect to public motor carriers, which are kindred to that State's segregation laws with respect to rail carriers —all of which laws were in effect at the time the discrimination against the present complainant is alleged to have occurred,—apply to interstate as well as intrastate passengers, it is not necessary to approach the present case from this aspect, because, as we have said, the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decision; and likewise, the railway company does not rely upon them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case because it does not, at least in terms, purport to embrace dining car service. Virginia Code 1942 (Michie) Sec. 3962-B. These sections read: "Sec. 3962. Separate Cars for White and Colored Passengers. —All persons, natural or artificial, who are now, or may hereafter be, engaged in running or operating any railroad in this State by steam for the transportation of passengers are hereby required to furnish separate cars or coaches for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial partition, with a door therein, shall be deemed a separate coach within the meaning of this section, and each

separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters, indicating the race for which it is set apart." "Sec. 3963. Company to Make no Discrimination in Quality of Accom-odations for White and Colored Passengers.—No difference or discrimination shall be made in the quality, convenience, or accom-odation in the cars or coaches or partitions set apart for white and colored passengers under the preceding section." Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case, because nothing short of race segregation in [fol. 123] separate cars, or in compartments "divided by a good and substantial partition, with a door therein," would satisfy those provisions.

It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, we turn to a consideration of complainant's second contention, which is that, even though it be held that the defendant carrier may lawfully segregate complainant because of his race while affording him dining car facilities, the segregation actually still permitted by the defendant railroad's present regulations which the Commission has approved is unlawful; because not affording him treatment substantially equal to that afforded white passengers under like conditions.

This contention brings us at once face to face with the necessity of passing upon the validity of the dining car regulations of the Southern Railway, in effect at the time in question, because although these regulations have not been promulgated by the Interstate Commerce Commission, they have been directly approved by it, as a result of its decision and order which is the basis of the present complaint. Therefore, they are to be treated, for the purposes of this case, as in effect the Commission's rules. This is obviously true for the further reason that the present complainant is contending that the Commission erred in not requiring the Southern Railway to cease and desist from applying these rules; or more specifically, that the Southern Railway should be required henceforth to abstain from adopting any rule or regulation with respect to its dining car service that imposes,—as it is claimed the present rules do,—upon Negro passengers, restrictions not imposed upon white passengers, under like conditions. Complainant's

right to complain does not depend upon whether he intends to make a similar journey in the future, Mitchell v. United States, supra.

These dining-car regulations have been quoted in an earlier part of this opinion in their entirety. It is to be noted that what the present complainant is really seeking is that he shall be given an absolute right to—a guarantee [fol. 124] of—*the same service in every respect* accorded to white passengers under like conditions. The defendant's dining-car regulations in effect on May 17th, 1942, that is, at the time of the alleged discrimination against the complainant, contained only a very general provision with respect to service of meals in dining cars at one and the same time to Negro and white passengers. They merely provided that "if the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them".

As we have seen, applying his own interpretation to this rule, the dining car steward allowed white passengers to occupy the end seats allotted to colored passengers before the complainant appeared and applied for diner service; and that, since the train was crowded with white passengers, he, the steward, continued to allow additional white passengers to be seated and served at these end tables, with the result that there never was a time during the hours when the dining car was open to passengers, that meals could be served therein to the complainant or to any other Negro passengers, at any table at which there were not one or more white passengers. This, as we have seen, the Commission found resulted in an unjust, undue and unreasonable prejudice and disadvantage to complainant in violation of Section 3(1) of the Interstate Commerce Act. It is our opinion that this conclusion was correct. However, the Commission further found that the supplementary dining car regulations put into effect by the defendant carrier on August 6th, 1942, adequately provided against the recurrence of such prejudice and disadvantage as respects complainant or any other possible Negro passengers on defendant's lines, and therefore, the Commission deemed the entry of an order for the future would serve no useful purpose. We are thus called upon to determine whether or not this interpretation by the Commission of the carrier's rules now in effect is correct; that is to say, we must deter-

mine whether they do, in fact, afford substantial equality of treatment to both Negro and white passengers with respect to dining car service.

We requote the pertinent parts of these supplementary [fol. 125] instructions as follows: "Before starting each meal pull the curtains to service position and place a "reserve" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables. After the tables are occupied by white passengers, then should colored passengers present themselves, they should be advised that they will be served just as soon as those compartments are vacated."

It is to be noted that the above instructions do not in fact require the setting aside of the two tables referred to *exclusively* for Negro passengers, but merely say that they "are not be be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed, and white passengers served at those tables. Obviously, the word "then" refers to any time during which meals are being served when there happen to be more white passengers applying for meals than can be accom-odated at other than the reserved tables. At least if it does not mean this, it gives no indication to the steward as to how long he should wait before assuming that no Negro passengers *will* present themselves. Nothing is contained in the regulations requiring the steward to take steps to ascertain whether there be any such persons on the train. Furthermore, the regulations do not take into account the probability that a Negro passenger may not desire a meal as soon as he boards the train and the dining car opens, or that he may board the train at an intermediate point after the dining car service has been begun and may desire at that time or later to be served in the dining car. In none of these contingencies do the regulations offer any assurance that the Negro passenger will have a reasonable chance to be served in the dining car before his journey ends.

Therefore, we believe that the Commission erred in hold-

ing that the defendant's general practice as evidenced by its [fol. 126] current instructions, will result in no substantial inequality of treatment as between Negro and other passengers seeking dining car service. In the case of the white passenger, he is merely required to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionally reserved for Negro passengers' use has been assig-ed to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eye of the law requires. None of the methods of segregation have been employed which have heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of the car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

We accept the Commission's construction of the supplemental regulation and its finding that the general practice thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But nevertheless in our opinion the regulation so construed, applied and practiced does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the segregation of white and colored passengers by the reservation of particular tables for colored passengers; nor do we think it unreasonable, in view of the recently prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers [fol. 127] when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently

applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers, or if none there, elsewhere in the dining car.

The analogy of the Mitchell case is very close. There, Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at 96-97): "It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specially assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passenger cannot, the latter are subjected to inequality and discrimination because of their race.' • • •

"While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served [fol. 128] in coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again, the analogy to the Mitchell case

is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches.

There remains to be considered one additional contention of the complainant, namely, that that part of the railroad's regulations which requires tables for Negro passengers in dining cars to be curtained also violates the rule of substantial equality in that such means of separation causes Negro passengers humiliation and embarrassment to which white passengers are not subjected. Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine.

For the reasons given herein, the order of the Commission dismissing the complaint must be set aside and the case remanded to the Commission for further proceedings in the light of the principles outlined herein.

William C. Coleman.

[fol. 129] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Docket No. 2455

ELMER W. HENDERSON, Plaintiff

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, Defendants

DECREE—Filed February 18, 1946

This cause coming on to be heard the 24th day of September, 1945 before the regularly constituted statutory Court, all parties being represented by counsel, the case being submitted to the Court upon the pleadings, certified record of the proceedings before the Interstate Commerce Commission, the briefs, and argument of counsel, it is by the Court this 13th day of February, 1946

Ordered, adjudged and decreed that the Order of the Interstate Commerce Commission entered on May 13, 1944 dismissing the complaint of Elmer W. Henderson vs. South-

ern Railway Co., Interstate Commerce Commission Docket No. 28895, be, and the same hereby is annulled and set aside and this case be, and the same hereby is remanded to the Interstate Commerce Commission for further proceedings in the light of the principles outlined in the Opinion of this Court, in the above entitled cause.

Morris A. Soper, United States, Circuit Judge;
William C. Coleman, United States District Judge;
W. Calvin Chesnut, United States District Judge.

Approved, as to form:

Charles Clark, Attorney for Southern Railway System; Allen Crenshaw, Attorney for Interstate Commerce Commission.

[fol. 130] **Offer in Evidence**

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28695

ELMER W. HENDERSON, 2560 McCulloh Street, Baltimore, Md., Complainant,

v.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT—Filed October 10, 1942

The Complaint of the above-named complainant respectfully shows:

I. That complainant is a citizen of the United States and a resident of the State of Maryland. He is employed by the United States Government, as field representative of the Fair Employment Practices Committee.

II. That the defendant above-named is a railroad corporation organized under the laws of the Commonwealth of Virginia and is a common carrier engaged in the transportation of persons and property by railroad in interstate commerce, between the District of Columbia and points in the States of Virginia, North Carolina, South Carolina,

Georgia, and others, and was so engaged as such common carrier at the time of the grievance hereinafter stated as having been suffered by the complainant from the acts of the defendant; that at the time of said grievances the [fol. 131] defendant was, for many years prior thereto had been, and is now engaged in interstate commerce and is subject to the provisions of the Interstate Commerce Act and its supplements.

III. The complainant, a Negro, purchased a first-class ticket on the Southern Railway together with a Pullman reservation to Atlanta, Georgia. On May 17, 1942, he presented the first class ticket and Pullman reservation aforesaid and in exercise of the contractual rights pursuant thereto boarded a southbound train in Washington, D. C. at 2:00 P. M. At about 5:25 P. M. on said date, the complainant went to the diner attached to said train for dinner. On said diner, two tables, separated by curtains, were reserved for Negro passengers. When complainant entered the diner, notwithstanding the reservation for Negro passengers aforesaid, several seats at these tables were in use by white passengers, but there were vacant seats. In this circumstance the complainant was advised by the dining car steward to return to his seat in the Pullman and wait until notified when he could be served. The complainant did so but was not notified. Thereafter the complainant returned to the diner and found that there were still white passengers at the tables reserved for colored passengers but there were also empty seats at those tables. The complainant demanded to be seated and served, whereupon the steward refused but offered to serve the complainant at his Pull- [fol. 132] man seat or, in the alternative, offered to serve him in the dining car later when all the white passengers had left the dining room, or when all the seats at the tables reserved for colored passengers were vacant. Complainant returned to his seat and waited approximately half an hour and then returned to the diner. White people were being served in all parts of the car, and interspersed were empty tables and empty seats. Complainant was again refused service. The diner was taken off the train at Greensboro, North Carolina, and the complainant was never served.

IV. The failure of the Railroad to seat and serve the complainant was unjust, unlawful, disadvantageous, un-

reasonable, discriminatory and in violation of the National transportation policy as set forth by the Congress in U. S. C. A., Title 49, notes preceding Sections 1, 30, and 901, in that the defendant failed to provide complainant "fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each".

V. The defendant violated Section 3, paragraph 1 of Title 49, U. S. C. in that it practiced undue and unreasonable preference and disadvantage against the complainant and subjected him to undue and unreasonable prejudice and disadvantage by (1) refusing to serve him, (2) by providing unequal, insufficient tables and dining car service in the dining car, (3) by the impractical, humiliating, discrimina-
[fol. 133] ting and unfair use of a curtain around the tables allegedly reserved for Negroes, and (4) by giving unlawful, discriminatory and unnecessary preference and advantage to certain white persons whose names are unknown to this complainant in respect to transportation and facilities in that it failed and refused to serve complainant at tables in the dining car where there were empty seats, which tables and seats were reserved for Negroes but which were allowed to be used by white persons.

VI. The defendant violated Section 41, Chapter 3, Title 8, U. S. C. in that it denied complainant the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

VII. The defendant violated Section 43, Chapter 3, Title 8, U. S. C. in that it denied and deprived the complainant of his rights and privileges and immunities as a citizen of the United States as guaranteed by Sections 1 and 3 of the Fourteenth Amendment to the United States Constitution.

VIII. The defendant violated Section 4 of Title 49 of U. S. C. in that it failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation.

IX. The defendant violated Clauses 1 and 2, Section 2 of Article IV of the United States Constitution in that it [fol. 134] denied the complainant the privileges and immunities to which he was and is entitled as a citizen of the United

States, any laws of any state through or in which the grievances herein complained of occurred to the contrary notwithstanding.

X. That by reason of the facts stated above the complainant was greatly embarrassed and humiliated; had to forego his meal, was denied the facilities and advantages provided by the defendant for other passengers, and was compelled to hire counsel to seek the enforcement of his rights.

Wherefore complainant prays:

(1) That the defendants be required to answer the charges herein;

(2) That after due hearing, in Washington, D. C., and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and in the future to establish, apply and enforce for the transportation of complainant and other Negro interstate passengers equal and just dining car facilities and such other services and facilities as the Commission may consider reasonable and just;

(3) That the defendant be required to remove and discontinue the impracticable and unequal and humiliating practice of using curtains around the tables reserved for Negroes;

(4) That reasonable and just damages, attorneys' fees [fol. 135] and costs be assessed against the Railroad for the aforesaid violations;

(5) That such other and further orders be made as to the Commission may seem proper and just in the premises.

Belford V. Lawson, Jr., 2001 11th Street, N. W., Washington, D. C. Dupont 6250. Earl B. Dickerson, 3507 South Parkway, Chicago, Illinois; Marjorie McKenzie, 2001 11th Street, N. W., Washington, D. C., Attorneys for Complainant.

[fol. 136] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28895

[Title omitted]

ANSWER—Filed November 6, 1942

The answer of Southern Railway Company to the complaint.

For answer to the complaint, defendant says:

I

Answering paragraph one of said complaint, defendant has no knowledge or information sufficient to enable it either to affirm or deny the allegations contained therein and asks proof thereof.

II

Answering paragraph two of said complaint, defendant admits that it is a common carrier by railroad engaged in part in interstate commerce, and that as to such commerce, it is subject to the Interstate Commerce Act in so far as the same is constitutional and enforceable.

III

Answering paragraph three of said complaint, defendant is without knowledge or information sufficient to enable it [fol. 137] either to affirm or deny the allegations contained therein and asks strict proof thereof.

Further answering said paragraph three, this defendant admits that on its train which leaves Washington, D. C., at 2:00 P. M., for Atlanta, Georgia, it is customary to take the diner off at Greensboro, North Carolina.

IV

Answering paragraphs four, five, six, seven, eight, nine, and ten, this defendant denies the allegations contained therein.

Further answering said complaint, this defendant denies that it has violated any section of the Interstate Commerce Act as alleged in the complaint, or any of the laws of the United States of America, or the Constitution of the United States, or that anything done or omitted by this defendant

with respect to the subject matter of this complaint is in violation of law or that it should be subjected to any adverse order; and this defendant denies the complainant is entitled to the relief prayed or any other relief. Each and every allegation in said complaint not hereinbefore admitted is hereby specifically denied.

[fols. 138-139] And, having fully answered, this defendant prays that the complaint be dismissed.

W. N. McGehee, H. G. Hedrick, Counsel for Defendant.

McPherson Square, Washington, D. C.
November 4, 1942.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to Belford V. Lawson, Jr., 2001 11th St., N. W., Washington, D. C., Earl B. Dickerson, 3507 South Parkway, Chicago, Ill., and Marjorie McKenzie, 2001 11th St., N. W., Washington, D. C.

Dated at Washington, D. C., this sixth day of November, 1942.

W. N. McGehee.

[fols. 140-141] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 28895

ELMER W. HENDERSON

vs.

SOUTHERN RAILWAY COMPANY

TRANSCRIPT OF HEARING

Hearing Room "B", I.C.C. Bldg., Washington, D. C.

Friday, February 24, 1943.

Met pursuant to notice at 9:30 a.m.

Before H. W. Johnson, Examiner.

APPEARANCES:

Belford V. Lawson, Jr. and Marjorie McKenzie, 2001 11th St., N.W., Washington, D.C., appearing for complainant.

Charles Clark and A. J. Dixon, Southern Railway Building, Washington, D.C., appearing for defendants.

[fol. 142] PROCEEDINGS

Exam. Johnson: The hearing will come to order.

The Commission has set for hearing at this time and place Docket No. 28,895, Elmer W. Henderson versus Southern Railway Company.

Who appears for the complainant?

Mr. Lawson: Belford V, Lawson, Jr., and Miss Marjorie McKenzie, who will be here shortly. She had to go to the District Court this morning. (was present later in the morning—H.W.J.).

Exam. Johnson: That will be all right.

For the defendant?

Mr. Clark: A. J. Dixon and Charles Clark, Southern Railway Company Building, 15th and K Streets, Northwest, Washington, D. C. Both have been admitted to practice before the Commission.

Exam. Johnson: You are a member of the practitioner's bar, are you not?

Mr. Lawson: I regret that I neglected to say that some months since I filed my application as advised by the rules. They advised me that I would hear from them in due course.

Exam. Johnson: You haven't heard from them?

Mr. Lawson: No.

Exam. Johnson: You understand it is approved?

Mr. Lawson: Yes.

Exam. Johnson: All right.

[fol. 143] Are there any interveners in this case?

(No response.)

STATEMENT OF THE ISSUES

Exam. Johnson: I will read the issues.

There were a few points in the complaint that were not under the jurisdiction of the Commission. So I have written out the issues as I see them, and I think that they are satisfactory to all the parties.

By complaint filed October 10, 1942, racial discrimination is alleged in the refusal of defendant to extend to complainant accommodations equal to those furnished to white passengers in dining car service on a trip from Washington, D.C. to Atlanta, Georgia on March 17, 1942, in violation of Section 3 of the Interstate Commerce Act and the Fourteenth Amendment to the Constitution of the United States guaranteeing equality of rights and protection under the laws.

The Commission is asked to direct defendant to cease and desist from the alleged unjust and discriminatory practices in the furnishing of such accommodations and to establish for the future for the transportation of complainant and other Negro interstate passengers equal and just dining car treatment and facilities.

Mr. Henderson, is that a correct statement of the issues as you understand them?

Mr. Henderson: I am satisfied with that issue. I think it covers all the corollary issues.

[fol. 144] Exam. Johnson: Your whole case is based on the dining car service and the treatment, as I understand it.

Mr. Lawson: Discrimination in dining car service and practices, yes.

Exam. Johnson: Mr. Clark, Are those the issues as you understand them?

Mr. Clark: Generally speaking, yes, Mr. Examiner. But

I see no purpose in referring to the constitutional provisions in your summing up of the issues, because that is not a matter within the jurisdiction of the Commission as such. Certainly it is unnecessary to plead the law.

I also object to and move that you strike from your statement of the issues the reference to racial discrimination. The Commission has jurisdiction of discrimination, however it arises. It remains to see in what respect the evidence shows. I am not sure that I get from the complaint the idea that it is racial. With that suggestion, your statement is correct.

Mr. Lawson: Of course, we oppose the deletion of the word "racial," because the very foundation of our case is racial, as I think the complaint sets forth; and I think the evidence will corroborate it.

Exam. Johnson: I think that is all right.

The complainant may call its first witness.

MOTION TO STRIKE FROM COMPLAINT

Mr. Clark: Before we proceed with the first witness, in view of your statement of the issues, may I merely, for the [fol. 145] Purpose of clarifying the record, move we strike from the complaint the allegations of paragraphs 4, 5, 6, 7, 8, and 9?

Also, I move we strike therefrom——

Exam. Johnson: 4——

Mr. Clark: 3, 6, 7, 8, and 9. Those are the ones I recollect would fall under your summarization of the issues.

I merely do that to protect the record.

Exam. Johnson: 4 seems to come under it very clearly. I will read that:

"The failure of the railroad to seat and serve the complainant was unjust, unlawful, disadvantageous, unreasonable, discriminatory and in violation of the National transportation policy as set forth by the Congress in U. S. C. A."

That it is U. S. Code, Annotated, I guess it is. "Title 49"—that is the Interstate Commerce Act.

"Title 49, notes preceding Sections 1, 30, and 901, in that the defendant failed to provide complainant 'fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so admin-

istered as to recognize and preserve the inherent advantages of each.' "

Mr. Lawson: Yes.

Exam. Johnson: 3, 6, 7, 8, and 9, as not coming under the jurisdiction of the Commission.

[fol. 146] Mr. Clark: Yes.

Exam. Johnson: What have you to say in regard to those separate issues, Mr. Lawson? They were not covered by the statement of the issues, as I read them, and to which you agree. I note they were correct.

Mr. Lawson: I think your issue covers generally our case. However, I think the Interstate Commerce Act is Section 49.

Exam. Johnson: That is right.

Mr. Lawson: Anything referred to in that section seems to be relevant and ought not to be deleted. Two of these paragraphs suggested by Mr. Clark for deletion suggest Title 49, which is the Act. Certainly anything within the four corners of the Act is relevant. And as I understand it, your issues are predicated upon that section.

Exam. Johnson: But sections 6 and 7 do not refer to those.

Mr. Lawson: I would be willing to concur in Mr. Clark's recommendation that they be deleted.

Exam. Johnson: What ones?

Mr. Lawson: 6 and 7, because there is a question of the Fourteenth Amendment.

Exam. Johnson: 6 and 7 will be considered as not having anything to do with this case.

[fol. 147] Mr. Lawson, I believe Section 8 there must be wrong—violated Section 4 of title 49. Will you check on that, please?

Mr. Lawson: What are you reading from?

Exam. Johnson: That is Section 8. I think that must be part 1, paragraph 4. I haven't got a copy of the code here. I believe that is Section 4, title 49, and that would refer, of course, to the long and short haul clause of the I. C. C. Act.

Mr. Clark: I can't see, Your Honor, where that has any bearing whatever, though, of course, I recognize it as part of the Act, just like a reference to the national transportation policy act of Congress, but it has nothing to do with the issues in this case.

Exam. Johnson: Off the record.

(Discussion off the record.)

Exam. Johnson: Article 9 of the complaint will not be considered in this case.

Mr. Clark: Has the reporter your ruling on 6 and 7?

Exam. Johnson: Yes, that is in the record, that 6 and 7 and 9 are out of the record.

Mr. Clark: I move that we strike from the prayer of the complainant that attorneys' fees and costs be awarded to the complainant.

Mr. Lawson: I concur in that. The Act doesn't provide [fol. 148] for it.

Mr. Clark: That is all on that subject.

Exam. Johnson: All right.

Now complainant may call its first witness.

The date of the brief will be March 26, 1943.

ELMER HENDERSON was sworn and testified as follows:

Direct examination.

By Mr. Lawson:

Q. What is your name?

A. Elmer W. Henderson.

Q. Where do you live?

A. I live at 2560 McColloh Street, Baltimore, Maryland.

Q. Were you on May 17, 1942, and are you now employed by the Federal Government?

A. I am and I was.

Q. In what capactity?

A. I am a field representative for the President's Committee on Fair Employment Practices in the War Manpower Commission.

Q. Calling attention to May 17, 1942, did you have occasion to board the Southern Railway train in Washington?

A. I did.

Q. How were you traveling?

A. I was traveling first-class Pullman.

Q. I show you receipt Pullman 27569, indicating that you we-e a first-class passenger. Was that receipt given you [fol. 149] by the Pullman Company?

A. That was.

Mr. Lawson: I suppose there is no objection to that. We might stipulate that he was on the train as a first-class passenger.

Mr. Clark: This, Mr. Examiner, is a slip of the Pullman Company entitled "Passenger Cash Fare Check No. EN-27569, Car S-24," as I make it out, from Washington to Atlanta. One passenger, lower berth No. 7. We don't question the authenticity of that slip.

Mr. Lawson: Mr. Clark, may we stipulate he was an interstate passenger on your train, to save time?

Mr. Clark: From Washington to Atlanta would be interstate, without question.

Mr. Lawson: Yes.

By Mr. Lawson:

Q. On that date did you have occasion to go into the dining car?

A. I did.

Q. And that was train 35, operated by the Southern Railway?

A. That is right.

Q. You were enroute to Atlanta?

A. That is right.

Q. About what time did you go into the diner the first time?

A. About twenty-five minutes after five o'clock in the afternoon.

[fol. 150] Q. You know whether or not that was the first call to dinner?

A. It was soon after the first call to dinner.

Q. When you went into the car the first time was it crowded?

A. No, it was not.

Q. How many passengers, or how many diners, I suppose you would call them, would you say were in the car?

A. It would be difficult for me to estimate the number, but several of the tables were occupied. I would say that probably one-third to one-half of the tables were occupied.

Q. Do you have in mind all the tables or the tables reserved for Negroes?

A. I was referring to all.

Q. All the tables?

A. Yes.

Q. To whom did you first talk when you got in the diner?

A. I first talked to the steward.

Q. Will you tell the Commissioner in your own words just what happened, what conversation you had with the steward, and just what happened to you on that occasion?

A. When I went into the dining car that afternoon after the first call for dinner, I was first stopped by the steward, who asked me what did I want. I told him I would like to be served. He said he would not be able to serve me, inasmuch as the two tables that I could be served at were not [fol. 151] empty. As I observed, there was one lady sitting at a two-seat table behind a curtain, which was undraped at the time, and there were two gentlemen seated at a four-seat table behind the draped curtain on the other side.

Q. What kind of table?

A. Four-seat table. In other words, there was one seat vacant at the two-seat table that I was particularly referring to, and there were two seats vacant at the four-seat table. There were other seats vacant elsewhere in the car. Of course, I don't remember exactly where they were.

The steward told me that I would not be able to be served at that time and suggested that I return to the Pullman car, and that he would call me. I stated that I would wait, which I did, about fifteen minutes. During that period he still refused to serve me, and I retired. I returned about 7 o'clock, as I recall, and at this time there was a considerable crowd in the dining car, but as I recollect, there were empty seats at some tables.

I again asked the steward for service and he said the Jim Crow laws in the South and the States through which we were traveling prevented him from serving me at that time. He said, "I am supposed to ask you if you want to be served in the Pullman car." I refused. He said, "Then I can only serve you in the dining car if and when these tables are vacant," referring to the tables behind the undraped cur- [fol. 152] tains. I insisted that I be served, but he refused. I returned to the Pullman car. I went back again in about half an hour from that time and the steward stated that he would call me in a short while, if I would return to the Pullman car, which I did. He did not call me at any time and the dining car was taken off the train at Greensboro, North Carolina, as I recall, about 9 o'clock in the evening. That was the substance of my experience.

Q. You made three visits?

A. I made three visits to the dining car.

Q. Each time you went were there vacant seats at the Jim Crow tables?

A. I am not sure there were vacant seats at them the last time I went in. I do know there were vacant seats the first two times I went. I just couldn't recall about the last time.

Q. On the occasions when you went in each time did you talk to the steward?

A. I did.

Q. And during those conversations were there other people, waiters or other passengers close enough to overhear the conversation between you and Lieut. Farrell or the steward?

A. It is possible, Mr. Counsel, but I seriously doubt it. I was standing right at the door; as I said, there were occupants at the table in front of me, one occupant of the table on the side. At no time, however, do I recall them being [fol. 153] interested enough to look up, although other persons in the car who I know couldn't hear what the conversation was, did look up.

Q. Do you remember how many passengers were at each of the Jim Crow tables on your first visit?

A. Yes, I do.

Q. How many?

A. There were two at the four-seat table and one at the two-seat table.

Q. On the second visit how many passengers?

A. I don't remember exactly how many, but I am sure there was a vacant seat at either table at the time of my second visit. I recall very vividly one person got up and another white person was seated.

Q. On either of those occasions there were places for you to have been served, at those or others reserved for Negroes?

A. Absolutely.

Q. Were there other passengers in line waiting to be served?

A. When I first went into the dining car there were no other passengers in line. I was the only passenger there. I stood there about fifteen minutes, I recall. During that time several passengers came in and were seated, but there was no line in which people were waiting for tables.

Q. Do you recall whether or not any of those passengers were seated at the reserved tables?

A. On my first visit I don't recall whether passengers

[fol. 154] were seated at the reserved tables. On my second visit I do recall that passengers were seated at the reserved tables while I was standing there.

Q. About this curtain. First, did the steward say anything to you about seating passengers in order of their appearance?

A. No, he didn't.

Q. Did he say anything to you about any written or published rule or regulations under which he was working?

A. He referred in one instance to the laws of the states, Jim Crow laws he called them. He said that under those laws he wasn't able to serve me. He also referred indirectly to, apparently, a regulation which he received, or instructions from the railroad company. He said, "I am supposed to ask you if you will be served in the Pullman car." I assumed thereby he was referring to some instructions which he had.

Q. Did he say anything to you as to whether or not those instructions or regulations were oral or written?

A. He did not state.

Q. Did he tell you that if and when he did seat you you would have to sit behind this curtain?

A. No, but he implied that. He said that I couldn't—I beg your pardon. Please scratch that. Yes, he did specifically refer to the fact I could only be seated at the two tables. He said, "I can't seat you at these tables until they are empty," meaning the two tables there. If I recall, those [fol. 155] were his exact words. He said, "I must empty these tables."

Q. In other words, you understood the only way you could be served was for one of the Jim Crow tables to be absolutely vacant?

A. I don't know about one—one or both of the Jim Crow tables had to be absolutely vacant, I am sure, before I could be served, if I could be served at all.

Q. There is no question in your mind about that?

A. No question in my mind at all.

Q. Did he suggest that he serve you in your Pullman seat?

A. He stated that "I am supposed to ask you if you will be served in your Pullman seat," and I refused such service.

Exam. Johnson:

Q. On what one of your trips was that?

The Witness: That was the second trip.

By Mr. Lawson:

Q. Did he say anything about an extra charge for serving you at your Pullman seat?

A. No, he didn't mention that at all.

Q. What did you say was the approximate time of your last visit to the diner?

A. It was around 7:30, I believe.

Q. To the best of your recollection, the diner was cut off around 9 o'clock?

A. I know it was, because I got off the train at Greensboro. We were standing in the station there for five or ten minutes, and I observed them taking the dining car off the train.

[fol. 156] Q. I suppose you were hungry, were you not?

A. I was.

Q. You were unable to get a meal at any time on that trip?

A. At any time on that trip. We didn't get into Atlanta until 6 or 7 o'clock the next morning.

Mr. Lawson: You may inquire, Mr. Clark.

Cross-examination.

By Mr. Clark:

Q. Let us see if I understand your testimony.

A. Yes.

Q. The first time you went into the diner was 5:25 p. m.

A. Yes, it was.

Q. The second time you went in was 7 o'clock?

A. Seven or a little after.

Q. The third time you say you went in was about thirty minutes thereafter, which would make it 7:30 p. m.

A. Yes, I think so.

Q. When you first went in, or when you went in the second time, it makes no difference, what was it the conductor or the steward of the car said to you about serving you in your seat in the Pullman car?

A. It was on the second trip that he mentioned that.

Q. What did he say?

A. He said, "I am supposed to ask you if you will be served in your Pullman seat."

Q. That is what I wanted to get clear. Didn't you under-
[fol. 157] stand he was offering to serve you in your seat at the Pullman?

A. Absolutely refused.

Q. The way you put it I wasn't sure.

A. Yes.

Q. He did, either the first or second time, offer to serve you in your seat in the Pullman car?

A. Yes.

Q. He didn't propose to *serve* you anything extra for that?

A. He didn't mention anything about charges.

Q. Your Pullman car was next to the diner?

A. I think it was the second.

Q. One car removed.

A. One car removed, or the second, I don't remember.

Mr. Lawson: As I recall, I didn't mention anything about that on my direct examination. Of course, he would not have the right to examine about anything except what was brought out on direct.

Exam. Johnson: You can bring that out on your direct.

By Mr. Clark:

Q. The fact is, he offered to serve you in there?

A. Yes.

Q. You said no?

A. Yes.

Q. You went back?

A. Yes.

[fol. 158] Q. Why didn't you accept that?

A. Why did I not?

Q. Yes.

A. Because I felt under the law I had a perfect right to eat in the dining car, if there were seats available at the tables.

Q. Just at the end of your testimony on direct you said you were hungry; that you were unable to get food.

A. That is right.

Q. Here is a man offering to feed you sitting in your seat where you wouldn't have to move. I want to know why you wouldn't let him do it.

Mr. Lawson: I object.

Mr. Clark: What is the ground?

Mr. Lawson: I think this is no small matter. We are dealing here with facts. We are not speculating about this man's hunger. Mr. Clark is fixing to ask him if he was hungry why didn't he take the steward's offer. I think that is irrelevant. That has nothing to do with the facts in this case. It is not speculation or opinion we are dealing with. It is a question of fact.

Exam. Johnson: I am inclined to believe that is a good objection, as to why he did not want to eat in the diner.

Mr. Clark: Counsel provoked the question by asking the man if he was hungry. He is asking to be compensated. He is being hurt. He was hungry. He was tendered food. [fol. 159] Why didn't he eat? I still think it is a proper question. That is a very important question.

Exam. Johnson: I will uphold that objection.

Mr. Clark: Then I may not ask him about that. Very good, sir.

By Mr. Clark:

Q. Who did you say you were at that time working for?

A. The President's Committee on Fair Employment Practices, War Manpower Commission.

Q. Is that the committee that recently put out an order against the Capital Traction Company here?

Mr. Lawson: I object.

Exam. Johnson: May I have that again?

Mr. Clark: He told us whom he was working for. I am trying to find out something about his committee, his employer, his background; asking if that is the committee which recently ordered the Capital Transit Company, our bus and street line here, to put on Negro bus drivers, Negro conductors and motormen.

Exam. Johnson: I think that is all right.

Mr. Lawson: I object to that strenuously. I think it is to raise the racial question this. Second, I can't see any testimony having to do with his employer. He testified where he worked. He doesn't know anything about his employer or what his employer has done. I think it very [fol. 160] obviously objectionable.

Exam. Johnson: If he doesn't know, of course he can so state.

Mr. Clark: Will you answer that question, please? He put racial in the issue.

The Witness: Yes; that is the committee.

By Mr. Clark:

Q. How long have you been in its employ?

A. Since November 3, 1941. This was May 17, 1942.

A. That is right.

Q. You said you were a field representative.

A. Yes, I am.

Q. The truth of the matter is you traveled around investigating what you considered racial discrimination; isn't that true?

Mr. Lawson: I object.

Exam. Johnson: Let us hear what his work is. Go ahead. I think that is all right.

The Witness: The committee and my work operate in this fashion: If we receive complaints of discrimination and violation of the President's Executive Order 8802, and they are considered bona fide, we will investigate the complaints. That was part of my duty.

Exam. Johnson: So at that time, you said, you were en route to Atlanta on that particular train.

The Witness: I was enroute to Birmingham via Atlanta.

By Mr. Clark:

Q. So you were an employee of this Fair Labor Com-
[fol. 161] mittee that was set up under the order you named, traveling to Birmingham to investigate some allegations of racial discrimination; is that right?

A. Yes, that is right.

Mr. Lawson: May I suggest if we have gone into the complete racial allegation—regarding what?

Mr. Clark: Tell us about it. Then I will be delighted for you to tell us what you were going to tell us about was.

Mr. Lawson: Was it industry, education, or what?

The Witness: War industry.

Mr. Clark: I am perfectly willing. What was the thing you were going to investigate?

Mr. Lawson: He has answered it now.

Mr. Clark: I can pursue it further. What industry?
The Witness: War industries in the Birmingham region.

By Mr. Clark:

Q. You did go down and make that investigation?
A. Yes, I did.
Q. That was the kind of work you had been engaged in for we will say a year approximately past?
A. No, since November 3.
Q. Have you continued in that line of work since?
A. Yes, I have.
Q. You are still doing that work?
A. I am.
Q. Do you recall when you entered the diner, which end of the diner did you come in, from the kitchen end or the opposite end?
[fol. 162] A. From the kitchen end.
Q. You referred to the two tables set aside for Negroes as "Jim Crow" tables. Do I understand you mean the table on the right hand side of the aisle and the left hand side of the aisle as you immediately entered the car?
A. That is right.
Q. So when you came into the car, you did not have to walk through the length of the diner to get to this station where you stopped and had some words with the steward?
A. No, I didn't.
Q. You met him immediately as you came in, is that it?
A. That is right.
Q. Whatever transpired, you were right there at the end of the car?
A. That is right.
Q. I understood from your testimony, I want to be clear, what he said to you was said quietly, without any offensiveness of manner and attracted no attention?
A. No, I don't think it attracted any attention. My appearance may have. I will say the steward was courteous although he seemed irritated, more irritated on the second and last trip.
Q. You must realize all I am trying to bring out is there was no confusion, no attention was attracted to the parley you had with him?
A. No confusion.

[fol. 163] Q. The waiters were serving the people sitting at the various tables?

A. Yes.

Q. Running up and down the aisle, were there waiters?

A. Yes.

Q. How many people would you say could be seated at one time in that diner?

A. That I could not say.

Q. Would you care to estimate?

A. I'd be afraid to estimate. It appeared to me to be a normal dining car such as I have seen on trains all over the country. I imagine it would have about the same number of seats most of the dining cars have.

Q. You did see the curtains cutting off these tables which you call "Jim Crow" tables?

A. Yes, I did.

Q. They were not drawn?

A. They were not drawn.

Q. I understand when you say not drawn, each one of the curtains was pushed back against the side of the car?

A. That is right.

Q. When those curtains were drawn, they would cut off the table from the table next to it?

A. Presumably.

Q. One from the other side would be drawn and cut off [fol. 164] that table from the one next to it?

A. Presumably.

Q. When you say Presumably, you mean that is the way it looked. What do you mean by that?

A. That is the way it appeared it would happen, but at no time I was standing there——

Q. They were not drawn?

A. That is right.

Q. From the construction of the car I take it you could see that aisle. What would happen if they had been pulled out to cut the two tables apart? Obviously, you couldn't cut them across the aisle, that would impede the progress.

A. That is correct. I couldn't speculate.

Q. Could you see how they could serve the other tables from the kitchen if they cut off the aisles?

A. I wouldn't want to say.

Q. You don't know how that would be?

A. No.

Q. All you can complain of the curtains, they were back against the side of the cars?

A. That is right.

Q. In your conversations to the dining car steward didn't you somewhat demur to having the curtains drawn at all? What did you say to him about it?

A. I didn't say anything to him about drawing the curtains.

[fol. 165] Q. How come in your complaint you refer to drawing the curtains——

A. I beg your pardon, I said at the time, when the dining car steward stated he couldn't serve me, I said, "Well it's very obvious that you can", or in words to that effect, "because you have the curtains there for that purpose". That I recall was my only reference to the curtains, directly to the dining car steward.

Q. The Pullman car you were in, was that crowded?

A. The Pullman car.

Q. Do you remember?

A. Frankly, I don't remember whether all the berths were taken or not.

Q. That was the car you traveled in the entire distance?

A. All the way.

Q. You said you were unable to get any food on this trip. That is a broad statement. Let's check into it a little. You left Washington you said about two o'clock?

A. Yes.

Q. You had no lunch on the train, did you have your lunch before you got aboard?

A. I don't recall.

Q. You don't remember whether you had lunch that day?

A. I don't recall.

Q. The next thing that would happen would be the dinner [fol. 166] hour, that is the time you talk about, 5:25, 7:00 o'clock, and 7:30?

A. That is right.

Q. From then the diner was taken off at Greensboro?

A. That is right.

Q. From about 9:00 o'clock, you say?

A. That is right.

Q. Then you got back on the train after observing the diner being taken off, continued your journey on to Atlanta.

A. I did.

Q. The train got in about six o'clock next morning?

A. I believe that time.

Q. There had been no other occasion for a meal between the time you left Greensboro and the time you got off that train in Atlanta, isn't that true? You wouldn't expect breakfast at six o'clock, would you?

A. No I don't expect breakfast. There is no reason why I couldn't have eaten if I had the opportunity any time after 9:00 o'clock that evening.

Q. Did you expect a little midnight snack or something?

A. I probably would have been very receptive to it if I could have gotten it.

Q. Are you accustomed in your daily life to partake of mid-night supper after having three meals a day?

A. I don't see where that is particularly——

Q. Answer the question.

[fol. 167] A. Now and then I might eat late at night, yes.

Q. When you went on to Birmingham you had an opportunity, I take it, to supply your breakfast wants either at Atlanta or enroute?

A. Yes.

Q. That is not in the picture——

A. Well, just a minute. In Atlanta I merely changed trains right there in the station to Birmingham, I didn't arrive into Birmingham until 12:00 o'clock that day.

Q. Which would be after the breakfast hour?

A. Yes.

Q. Your complaint deals with Washington to Atlanta, you appreciate that.

A. True.

Q. I wanted to make it perfectly clear that from the time that the diner was taken off, normally there is no occasion for a passenger to be eating another meal between 9:00 o'clock and 6:00 o'clock the next morning, you will agree with me on that?

A. I don't know whether I agree on that at all, Counsel, I have traveled on many trains where you could at least get sandwiches or something of the sort way up until a late hour at night.

Q. In your conversation with Lieutenant Farrell, did you tell him where you were going?

A. No, I didn't. I don't recall.

[fol. 168] Q. Did you tell him where you got on the train?

A. I don't recall.
Q. You don't recall having given him that information?
A. No.

Mr. Clark: I think that is all.

By Exam. Johnson:

Q. Mr. Henderson, one or two points, when you came back the second time, or the second trip, did the dining car steward make any excuse for not calling you, I believe you stated he would call you when the table was available?
A. He made no excuse whatsoever.

By Exam. Johnson:

Q. I believe you made the statement when you came back the second time or else while you were standing there waiting that some of the white diners, white people, got up and others were seated?
A. Yes.
Q. Which trip was that?
A. That was the second trip.
Q. That was the second trip at 7:00 o'clock?
A. In that, Mr. Examiner, I am referring to the two so-called "Jim Crow" tables. During the fifteen minutes I stood there on my first trip persons did come into the dining car and were seated at other tables. It is true they were also seated——
Q. Was there any time when either table was entirely [fol. 169] vacant.
A. Not while I was there.

Exam. Johnson: I think that is all at present.
Mr. Lawson: May I clear up one or two points?
Exam. Johnson: Do you have any other examination?
Mr. Clark: No.
Exam. Johnson: You're through with this witness?
Mr. Clark: Yes.

Redirect examination.

By Mr. Lawson:

Q. When you said you didn't get any food on this trip you meant, did you not, you had no chance to get any food on this diner?

A. Correct.

Q. Because of the refusal of the dining car steward to serve you in the diner?

A. That is right.

Q. With respect to the so called "Jim Crow" tables, they are not only near the end of the diner but they are right in the corner near the kitchen, aren't they?

A. Yes.

Q. With respect to your employment, you don't go around stirring up racial conflict, do you?

A. No.

Q. Your job is to investigate unfair practices in war industries, is that correct?

[fol. 170] Mr. Clark: I think the examination is a little leading.

Mr. Lawson: That last question might have been. I withdraw it.

By Mr. Lawson:

Q. Specifically, what is your employment?

A. Mr. Counsel, I am a field representative of the President's field committee on employment practices which was created by the President's Executive Order created June 1941.

Mr. Clark: It is an Executive Order, Mr. Examiner. If you wish it in we will be very glad to make a note of it.

Mr. Lawson: There is no use to keep on repeating.

The Witness: I would like to make very clear, however, the Order has absolutely nothing to do with dining car facilities so far as I know. At least at that time that was the farthese from my mind. When I went into, if you will permit, when I went into the dining car I had no other thought in my mind except being seated and served. I felt that I should have been served in the dining car, because there were vacancies, that there were not only seats at other tables, there were also seats at these two tables behind the drawn curtains. That is the basis of my complaint. I would like to make it very plain since Counsel has suggested, that there is positively and absolutely no connection between my employment and the incident which occurred on this trip, or my bringing this complaint before the Interstate Commerce Commission.

By Mr. Lawson:

Q. You say there was no confusion during any of the con-
[fol. 171] versations between you and Mr. Farrell.

A. Yes.

Q. During any of your conversations with him, how close would you say there was another person, waiter or passenger, if you remember?

A. There were waiters going back and forth. Of course, the kitchen was right there. They were busying themselves doing work. No doubt it is possible, in passing, persons could have heard the conversations between Mr. Farrell and I. But no one seemed to be paying particular attention to what was said although I could see that persons in other parts of the car were certainly interested in my standing there.

Q. In his refusal to serve you, is that what you mean?

A. Yes.

Q. You were damaged were you not? Did you suffer damage?

A. I did.

Mr. Clark: Now——

Mr. Lawson: We have right to prove damage.

Mr. Clark: Prove the facts. Let the Commission determine.

Mr. Lawson: That is right.

By Mr. Lawson:

Q. You don't remember whether you had lunch before you got on the train on May 17 or not?

A. No, if anything, I don't believe I did. I remember I was very hungry, Mr. Counsel, when I first went into the dining car. In fact 5:25 is little prior to my normal eating hour during the day. It occurred just after the first call for
[fol. 172] dinner, and I did go into the dining car.

Q. Tell us what damages you suffered?

A. Oh, I was hungry. I felt very inconvenienced and somewhat ill the next morning.

Q. Were you embarrassed?

A. I was very seriously embarrassed.

Q. In what way?

A. I was embarrassed before the patrons whom I am sure observed my predicament. And I was embarrassed before

the servants on the car, and my own feelings were very seriously——

Q. When he refused to serve you, when you saw white people getting up, being seated in the "Jim Crow" cars, when he suggested to you you'd have to sit by the curtain, you suffered personal embarrassment and inconvenience to a great extent, did you not?

A. Absolutely.

Q. One final question. Do you wish to be bound by the exact time of your visit to these cars?

Mr. Clark: That is not a proper question, if he is testifying to facts he is bound by them, asking a man questions, then being bound by his answers. I object to that type of examination.

Mr. Lawson: Surely you wouldn't want us to be held to 5:25. I want it understood that he was merely approximating it.

[fol. 173] Mr. Clark: Counsel may ask his witness anything he wants to about those details. To ask a man what time did you, or about what time, as if you are going to be bound by that, I never heard of such examination.

Mr. Lawson: I am trying to save time merely.

Mr. Clark: We don't want to save time to the expense of the ——

Mr. Lawson: Neither do we.

By Mr. Lawson:

Q. Do you remember exactly what time you went in the diner the first time?

A. (By the Witness): The first time it was exactly 5:25.

Q. The second time?

A. The second time I believe it was about 7:00 o'clock or about five minutes after.

Q. The third time?

A. The third time I believe it was about 7:30.

Mr. Lawson: I think that is all.

By Exam. Johnson:

Q. As I understand it from the testimony this case just applies to the treatment you had in the diner, it has nothing to do outside of that car.

A. No, it has nothing to do outside.

By Exam. Johnson:

Q. You are perfectly satisfied with everything else on the trip.

A. Absolutely.

Exam. Johnson: I think that is all I have.

[fol. 174] Mr. Clark: One question, Mr. Examiner. In view of the redirect examination.

Exam. Johnson: Yes.

Re cross-examination.

By Mr. Clark:

Q. You spoke of the passengers in the diner as perhaps interested in you when you were talking about the steward. Wouldn't a more accurate statement be, they observed rather interested. I was wondering how you could know whether they were interested or whether they were not. Don't you mean they merely observed you?

A. They did observe, of course. It was in the observation, however, you know when a person in being embarrassed and inconvenienced, you feel, it is possible to see the feelings of other persons a little more plainly than you do otherwise. I could see that these people who were looking at me were also keenly interested in my predicament.

Q. They were observant?

A. That is true.

Q. The interest was in your own head, you were the one that was interested, they were observant.

A. They were observant, not hearing any conversations that might have taken place between them it would be impossible for me to say what they said to each other particularly concerning it. But I certainly feel that they took great interest. I insist they took great interest in my predicament.

[fol. 175] Mr. Clark: That clears it up I think.

Redirect examination.

Mr. Lawson:

Q. When a person is observing you, you can tell whether or not that person is interested in you or it by the interest on their face, time they look at you, etc.

A. I certainly do.

Mr. Clark: I still say the examination is decidedly leading.
Mr. Lawson: I am laying down facts for the next question.
Exam. Johnson: Finish it up.

Mr. Lawson:

Q. From these observations you determine by various methods——

Mr. Clark: I object to that.

By Mr. Lawson:

Q. How did you determine——

Mr. Clark: Let him tell how it was done.
Mr. Lawson: I withdraw the question.

By Mr. Lawson:

Q. How did you determine these people were interested in you and these incidents?

A. From the expressions I observed on their faces and the intent gazes we might say, which they directed toward the steward and myself.

Mr. Lawson: That is all.
Mr. Clark: That is all.
Exam. Johnson: You are excused, Mr. Henderson, thank you.

(Witness excused.)

(Recess.)

[fol. 176] By Exam. Johnson: I might say that there is no free copy of the record.

Lt. Chester M. Farrell was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Mr. Witness, you have been sworn?
A. Yes.

Q. Will you give your name and present residence to the reporter?

A. Lieutenant Chester N. Farrell, Army Air Forces.

Q. Where are you stationed at the present time, Lt.?

A. I don't believe I can answer that question.

Q. I will withdraw that question. It is a natural one for civilian witnesses.

Exam. Johnson: Yes.

By Mr. Clark:

Q. Have you ever been in the employ of the Southern Railway Company?

A. Yes Sir.

Q. In what capacity?

A. As dining car steward.

Q. How long were you dining car steward?

A. Six years.

Q. Did you hear the testimony of the Complainant in this case just given this morning?

A. I did.

[fol. 177] Q. Were you in charge of the diner on Train 35, of May 17, 1942.

A. I was.

Q. Was that train one of your customary runs?

A. It was.

Q. So daily or every other day, what ever it was, you were in charge of the diner on that train, is that right?

A. Yes sir.

Q. Of course, you had come back to Washington on some other train which is of no moment here.

A. That is correct.

Q. What diner did you have on that date, by number? Do you remember the number of your car?

A. No I couldn't remember that.

Q. Do you recall how many diners you can seat, how many persons you can seat at one time in that car?

A. Thirty-six.

Q. Were the tables all the same on both sides of the aisle or was there any difference?

A. No, Sir. Leaving the kitchen walking facing from the kitchen, I should say on the left side of the dining car, the tables seated four people. On the right side of the dining car they seated two people.

Q. So there were two-seater tables on the right and four-seater tables on the left, aisle between them.

[fol. 178] A. Yes.

Q. Does that extend all through the diner?

A. Yes.

Q. Did you say how many could be seated at one time?

A. Thirty-six.

Q. Was that your regular car?

A. Yes.

Q. Do you recall about what time you left Washington?

A. About 2:00 o'clock.

Q. P.M.?

A. Yes.

Q. When, as best as you can tell us, were the doors open for the serving of dinner on that trip?

A. 5:30, Sir.

Q. P.M.?

A. Yes, Sir.

Q. Was that the normal time of opening, was it later or earlier than usual do you recall?

A. It was the normal time of opening the diner.

Q. You say you recall the complainant testify, do you recall having seen him before in your car?

A. Yes, Sir.

Q. Do you recognize the complainant?

A. Yes, Sir.

Q. Would you mind telling us please, Lt., just when you [fol. 179] first saw him on this particular trip?

A. I was standing near the buffet of the dining car which is also, I might describe it as the linen locker to those familiar with the dining car——

Mr. Clark: Don't talk too fast. I want the reporter to be sure she gets it.

Lt. Farrell: — there was a line of people waiting to be served into the diner. This gentleman made himself conspicuous by the fact he was coming around these people walking past them until he got to the front. I thought he was going through the car. A seat in the dining car was then vacated and he started up to take this seat. I told him that he was not first, that other people had been waiting before he had. In fact, there were people waiting, I explained to him people were waiting that I was to notify in the Pullman cars as soon as I could possibly serve them.

I then suggested to him I could give him better service and faster service if he would let me serve him at his space that he was occupying on the train.

Mr. Lawson: Will you excuse me a minute, I want to ask a question.

Exam. Johnson: About the question?

Mr. Lawson: What about the exclusion of these other witnesses?

Exam. Johnson: Oh no. They are allowed.

[fol. 180] Mr. Lawson: I wanted to make sure.

(Witness): He replied that he did not want to be served in his space. He wanted to be served in the diner. I explained to him that crowded conditions of the dining car, asked him to cooperate with me, let me serve him in his space and he stood there for about three or four minutes, then left. I didn't see him again for some time.

Q. At that time, you have heard of two tables referred to here as "Jim Crow" tables, the first table on the right and the first table on the left at the kitchen end of the car. I should perhaps ask you whether or not there is any distinction made in the seating of passengers in those tables, they have been called "Jim Crow" tables here, tell us about that please.

A. Those tables are used for colored passengers on the train when they are not occupied by white passengers. They are there curtained off, for that privilege alone, to serve a colored passenger.

Q. Are those curtains at all times drawn or describe how those curtains are arranged?

A. No, Sir, those curtains are not drawn at all times. They are only drawn when a colored passenger occupies one of the seats.

Q. The complainant then returns, as I understand, to his space, when did you next see him, if you saw him again?

[fo. 181] A. About one hour later.

Q. About an hour later he came back?

A. Yes.

Q. What happened then, Lt.?

A. I told him conditions in the dining car were about the same, and I called a waiter that was standing—passing me at the time, and told this waiter to serve this gentleman, to take his order and to serve him in his space in the car.

The waiter replied, told him that he would and was ready to take his order which i. refused again to be served.

Q. With respect to serving this passenger at the "Jim Crow" tables, you know which two I mean, behind the curtains.

A. Yes.

Q. Did anything transpire between you and the complainant about serving him at those tables?

A. Yes.

Q. What was it?

A. I told him the situation there, when these tables were available to serve him I'd have to seat him behind these curtains and draw the curtains. He questioned whether those curtains should be up there, said he would not be embarrassed or humiliated by sitting behind the curtains.

Q. He refused to be served at the tables we referred to here as the "Jim Crow" tables.

A. Yes.

[fol. 182] Mr. Clark: I use that term as merely description you understand, Mr. Examiner.

By Mr. Clark:

Q. Tell me something Lt., further on that account to advise us. Did the passenger at the end of this second conversation return to his seat in the Pullman car?

A. As far as I know, he left the diner.

Q. He left the diner?

A. Yes.

Q. He came in from the kitchen end on those two trips?

A. Yes, sir.

Q. Two visits to the diner?

A. Yes.

Q. Did he return a third time?

A. Not to my knowledge.

Q. As far as you can recall he only made two trips into the diner?

A. Yes.

Q. Not three?

A. Yes, sir.

Q. Tell us something please about the way passengers come into the diner to be served. What I have in mind is, is this, do they come in regularly, one by one, or do they

come in by groups, or do they come in surging in on you at one time, then there is a gap, give us some idea how your passengers flow in normally in your diner?

[fol. 183] A. Passengers come in mostly in groups. In this particular run as I recall it, however, that is the way they came in, is groups.

Q. You opened you say about 5:30, you had a number apparently that came in, is that correct?

A. Yes, sir.

Q. Then you recall this diner is taken off somewhere enroute. Where is that?

A. Greensboro.

Q. What hour?

A. Approximately nine o'clock.

Q. Is that the regular time for that train to be about Greensboro?

A. Yes, sir.

Q. On this trip I take it your car was taken off there?

A. Yes, sir.

Q. When the train reaches Greensboro obviously your passengers in your car must have finished their meals if they continue, get back in their space to finish their journey, in that case what steps do you take to see that your passengers have time to be fed, how are you governed by that knowing how people come into your car.

A. You mean, excuse me if I understand ——

Q. Let me make it clear. Obviously you can't serve a man in five minutes a full course dinner. You have to be [fol. 184] guided by some considerations in cutting off serving people so they can get through by the time you take your car off at Greensboro.

A. Yes, sir.

Q. I want you to tell us how that works?

A. A passenger coming to the dining car say approximately 8:30, I'd tell him that the diner was going to be taken off, if the train was on time, or assuming that, at 9:00. Then he'd have to order accordingly, I'd tell him the length of time he had to eat.

Q. In estimating the time that it takes for a passenger to eat a normal dinner on your car, is there any absolute set regularity among passengers in the time they take to consume their meals.

A. No, sir.

Q. Would the nature of their order have any bearing on the time that would be consumed?

A. Yes, sir.

Q. Give me an example of something that might be slow or something that might be long in getting up the order?

A. For instance, if a passenger coming into the dining car ordered roast beef which was already prepared he could naturally get that faster than he could get an order of lamb chops or steak which takes approximately twenty or twenty-five minutes to prepare properly.

Q. The kind of order put out affects the amount of time it takes to serve a diner.

[fol. 185] Q. Would the fact the passengers come in in bunches rather than come in evenly affect the time consumed?

A. Yes.

Q. I believe you recognized and told me there was a difference between persons themselves as to the speed with which they consumed their food?

A. Yes, that is true of most of us.

Q. Have you on your run had occasion where passengers had not finished their meal by the time you were cut off at Greensboro?

A. Yes.

Q. What do you do in a case of that kind?

A. In a case of that kind, we have made it a policy to void their check.

Q. In other words, if they don't finish their meal, they just get up and go back to their space?

A. Yes.

Q. Do you recall whether or not on this particular run, anything of that kind happened?

A. I don't recall voiding any checks, but I do recall there were a lot of passengers not served.

Q. Is it a frequent occurrence you might have a little rush at the start when you first open your car for din-er, they would be fed, and there will be a hiatus, then have a few people, then there will be a crowd toward the latter part of the time?

[fol. 186] A. Yes, very frequently.

Q. That is the result, I take it, of just the time the people come into the diner?

A. Yes.

Q. Is there anyway you can make them come in in any regular stream?

A. No, sir.

Q. Tell me, with respect to seating passengers, how do you go about seating them at your several tables?

A. Well, it is customary to try to seat them where the space was available. Of course, you cannot always make a person sit just where you want him to sit. Lots of cases where I offered them a seat in one part of the dining car, she would say, "Oh, I would rather sit over here," and sit in the other place in the car.

Q. What effort do you make to distribute and seat them. How do you go about that as a practical matter?

A. Well, the way the custom of that was according to the waiting for the next persons as far as that is concerned. If I may describe it this way: The first person coming into the dining car would be seated at Number 1 station, Number 1 waiter, the next at Number 2 station, the next at Number 3 station, until it got so it didn't make any difference where you seated them.

[fol. 187] Q. As your passengers come in, you distribute them through your car among your waiters which partly enables the waiters to give them prompter service?

A. Yes.

Q. That would seem to follow, I take it, the almost obvious fact that if you put them all at one table, you would have three our four of your waiters doing nothing.

A. Yes.

Q. So you try to distribute them?

Mr. Lawson: A little leading there.

Mr. Clark: Thank you. I was trying to clear that up from his testimony.

The Witness: The main idea is to seat them where they can be better served, to give them the best service.

By Mr. Clark:

Q. Do you recall whether or not there is any provision made at Greensboro for passengers to get anything to eat, aside from, of course, the diner?

Mr. Lawson: I object to that question for the reason our complaint is based on this diner, not on the restaurant or any other facility.

Exam. Johnson: Let's see. This might be in the diner. I don't know.

Mr. Clark: No, I don't mean in the diner. I mean aside from the diner, if there are any facilities at Greensboro where one can get something to eat.

[fol. 188] The Witness: Yes, I can get sandwiches and coffee at Greensboro.

Exam. Johnson: Would that apply to passengers going on?

Mr. Clark: That is what I am asking him about.

Mr. Lawson: That is what I am objecting to. I objected to the first question. I would like to have it deleted.

Exam. Johnson: Let's see what Mr. Farrell says about this question whether this would apply to persons going through Greensboro as in the case of Mr. Henderson. I want to see whether it is connected up with this case.

The Witness: For instance, if we were going down here at night, the diner was crowded and we couldn't get in to have something to eat, the diner was cut off at Greensboro, we could go outside and get sandwiches and coffee. They sold them right on the platform.

Exam. Johnson: I think that is all right. As I remember, Mr. Henderson claims he did not get anything at Greensboro. I think that question is really in the case.

Mr. Lawson: I want you to understand my objection has to do only with the diner.

Exam. Johnson: That is right.

Mr. Lawson: Whether or not Mr. Henderson could have gotten off the train to a restaurant is irrelevant to this case. That is my objection, because, you see, that would mean that the railway company would be taking advantage of its own wrong.

(Discussion off the record.)

[fol. 189] Exam. Johnson: Proceed.

By Mr. Clark:

Q. The complainant has testified here that he observed your diner being cut off at Greensboro?

A. Yes.

Q. I am asking you whether or not, aside from the diner, if there was any facility or any way that a passenger, this

complainant, for example, could have gotten anything to eat at Greensboro while train 35 was standing at that station?

A. Yes, they sell sandwiches and coffee there on the platform at Greensboro.

Q. The station platform?

A. Yes.

Q. Where the train was?

A. Yes.

Q. Does that occur from time to time or with any degree of regularity or what that the passengers who don't get fed in the diner are able to meet their needs by that method on the platform?

A. Yes.

Q. Does that happen?

A. Yes; it happens frequently.

Q. While you have been in charge of this car?

A. Yes.

Q. In leaving at 2:00 o'clock, was your car open for lunch?

A. Yes.

[fol. 190] Q. Do you recall on that trip whether or not you saw the complainant in your car for luncheon?

A. No, sir.

Q. He didn't present himself?

A. No, sir, he didn't, to my knowledge.

Q. Obviously from your title, you are no longer in the dining car service. You are now in the armed services?

A. Yes.

Q. The complainant has made reference in his testimony, charged in his complaint he was humiliated. I want to ask you to describe, tell us in what tone of voice and in what manner, how your conversations with him were conducted, as bearing on that. Will you please explain that, as best you can?

A. I talked with him at all times with the greatest of courtesy that I possessed. I even asked him to even help me, to cooperate with me, and let me take care of him, serve him.

Q. I believe he said you mentioned to him the fact that under the State laws you could not serve him at these tables he wishes to be served at?

A. I did.

Q. That happened?

A. Yes.

Q. Was there any confusion or commotion to attract atte
tion in the colloquies you may have had with him?
[fol. 191] A. No, sir.

Q. Mr. Farrell, do you have many diners on that run o
any other that you may have run— First, take this pa
ticular run. Do you have many diners coming in for servic
who are colored persons?

A. Not very many.

Q. In this day and time when you were last serving, ha
there been any increase in the passenger traffic and perso
using the dining car facilities?

A. Yes.

Q. Was that increase, in the main, in the white passenge
or was it in the colored passengers?

A. White passengers.

Q. I appreciate that it is a rather difficult question I a
going to ask you. How would you describe the relativ
number of colored persons as related to the white perso
that are served on that run? Is there any way you can te
us any percentage, give us any idea? I don't know, yo
may have some idea?

A. That are served in the diner?

Q. Yes.

Mr. Lawson: I don't believe I am quite clear on th
question.

Mr. Clark: I am trying to determine what the percenta
of colored passengers that seek dining car service is as co
[fol. 192] pared with the total service, is it a small, insigni
cant, negligible amount?

The Witness: I would say a thousand to one.

By Mr. Clark:

Q. In other words, it is relatively a quite small propo
tion of colored passengers who seek dining car service?

A. Yes.

Q. Is that true only of train 35 that you operated or
that fairly representative of other trains on which you ha
dining car service?

A. That was true of all trains that I have ever work
on.

Q. It is relatively small?

A. Yes.

Q. I want to ask you this. Despite the fact that the nu

ber of colored persons seeking dining car service on this train and others you have operated, is small, I want to ask you whether or not in the cars you had charge of, whether you have or have not served them as they presented themselves for service?

A. I will have to ask you to say that again, please, sir.

Q. Bearing in mind, although you told me you had a relatively small number of colored persons seeking service, have you or have you not served that relatively small number as they have come in?

A. Yes.

Q. You have served them?

A. Yes.

[fol. 193] Q. It would be appropriate in this case for you to tell us how you served the colored passengers? The reason that is important, Mr. Examiner, there is a cease and desist order asked for. I make the question a little broader than applying to this one complainant and for that purpose. That is the purpose of my question.

How do you serve your colored passengers? What do you do? Tell me about the tables, your curtains as a general proposition.

A. The usual manner of serving the colored passengers which come into the dining car, if these tables set aside for colored passengers were available, we would seat them at that table.

Q. At once when they presented themselves?

A. Yes. Then if these tables happened to be occupied, it was our custom to offer them service in the space that they may be occupying on that train.

Q. Their Pullman space, for example?

A. Yes.

Q. Would you seat a colored passenger at one of your four-seated tables, in, say, the body of the car, some table other than the so-called Jim Crow tables, if there were one or two white passengers sitting at that table?

A. I would not.

Q. You set aside these tables for your colored passengers?

[fol. 194] A. Yes.

Q. As I understood you, you would only use those for whites when the other part of your car was being——

A. Filled.

Q. Being occupied by white passengers?

A. That is right.

Q. When a passenger comes in to the car, do you make any effort to preserve and reserve these Jim Crow tables for your colored passengers or do your passengers always seat themselves where you would like to have them seated? What happens?

A. We would always seat the people at the other end of the car, other than these tables, first. When those tables are occupied, then we would avail ourselves to use them.

Q. If a white passenger comes in from the kitchen end of the car, it is perfectly possible, I take it, you might be down at the opposite end of the car, is that true?

A. Yes.

Q. In such a situation, is it true such passenger will seat himself at the Jim Crow table? After he once gets seated, what do you do about it?

A. Very often a passenger will come into the dining car and take the first seat to sit down. I never had the occasion to ask him to move for my convenience or anyone else's.

Q. After he first seats himself there, you wouldn't ask him [fol. 195] to move, I take it?

A. That is right.

Q. In this particular instance, the testimony is there were white persons sitting at your so-called Jim Crow tables.

A. There were.

Q. Do you know under what conditions they were seated there, how they happened to get there?

A. Mainly, as I recall it, the rest of the seats in the dining car were occupied. It could happen. If the witness is present——

Exam. Johnson: I wondered if you had the additional information.

Mr. Clark: I thought he might be sent out of the country. I couldn't get him.

Mr. Lawson: Obviously that is part of the record. You can't take depositions under the rules properly then and have an attorney come in and just delete it if for no other reason than the question of impeachment.

(Discussion off the record.)

Cross-examination.

By Mr. Lawson:

Q. Lieutenant Farrell, this train 35 left here about 2:00 o'clock?

A. Just about.

Q. What time did lunch start on your diner?

A. Immediately.

[fol. 196] Q. Passengers were eating when the train pulled out?

A. Yes, sir.

Q. What time did ounch end?

A. I could not tell you exactly what time it ended. If you want it approximately, I would say it would be around three-thirty, something like that.

Q. As a matter of fact, this was a Sunday, was it not?

A. As I recollect, it was.

Q. Weren't passengers served right straight through, lunch and dinner?

A. No, we always clear the dining car to clear it up.

Q. What time did you clear the diner?

A. I would say approximately three-thirty.

Q. You opened it at five-thirty?

A. Five-thirty.

Q. How do you know you opened it at five-thirty on that day?

A. I am approximating everything I say, when I say five-thirty, I mean five-thirty approximately.

Q. Your testimony is you are not sure it was five-thirty?

A. It may have been five twenty-four or five twenty-six.

Q. So it is possible the diner was open at five twenty-five?

A. That is right.

Q. You said this complainant walked by the front and walked on into the diner?

A. The line of passengers.

Q. Yes, I believe you said that. What time did this line of [fol. 197] passengers get there? When you opened the door at approximately five-thirty were they standing there?

A. Yes.

Q. All lined up standing there waiting?

A. Waiting to be served.

Q. At five-thirty?

A. That is my recollection.

Q. When you opened the dining car door, they all rushed in, including Mr. Henderson?

A. No, I didn't say including Mr. Henderson.

Q. What did Mr. Henderson do?

A. The dining car was filled when I first observed Mr. Henderson.

Q. He was behind the line then?

A. He was coming up the aisle.

Q. Didn't you testify on direction examination that he walked past this line?

A. I did.

Q. How could he walk past the line if when you first saw him the diner was full?

A. That didn't have anything to do with the diner being filled.

Q. The diner was filled, there was still a long line?

A. Surely.

Q. Where was Mr. Henderson when you first saw him?

[fol. 198] A. I saw him go up the aisle. Not in the diner, you understand. Next to the kitchen, from the Pullman end of the car.

Q. With respect to the dining car, he was coming from the kitchen end?

A. Yes, sir.

Q. That is the kitchen end, then there is a narrow aisle along the side?

A. That is correct.

Q. In that aisle there was this line of people?

A. That is correct.

Q. Where was Mr. Henderson, at the dining or end of that line?

A. When I first observed him he was about the middle of it.

Q. How did you happen to be outside the diner looking down that aisle?

A. It is customary for me to stand there. It is usually where I took my position in the dining car after it was filled.

Q. With a crowded diner you were standing out in the aisle looking down the aisle?

A. Yes. I stand there mainly for one reason.

Q. Why?

A. To keep the diners from causing a congestion, the

waiters passing from the kitchen. Naturally on this occasion they were in the way. I was standing there to keep [fol. 199] the food from being spilled upon them, anything like that.

Q. People in the aisle were in the way of the waiters?

A. Yes, no question about that.

Q. No question?

A. That is right.

Q. What were you people doing down the aisle?

A. I didn't say they were down the aisle.

Q. Not quite so fast. Mr. Henderson was in the middle of this line of people in the aisle?

A. I say Mr. Henderson.

Q. You were standing in such position as you could see down this aisle?

A. Yes, sir.

Q. As you come up the aisle by the side of the kitchen, isn't there a turn from that aisle into the little pantry?

A. Yes.

Q. Isn't there another turn to the left into the diner?

A. That is correct.

Q. Where were you standing?

A. In front of the linen locker. You know where that is.

Q. I believe I do. So you could see down the aisle?

A. Yes.

Q. As you were standing there, it was your testimony, the dining car was full of people?

A. Yes.

[fol. 200] Q. Every seat taken?

A. To my best knowledge it was at that particular time. They wouldn't have been standing there if there were any vacant seats.

Q. That was as soon as you opened?

A. Yes, approximately.

Q. Who was arranging the seating of these people as they got into the diner?

A. Those conditions, lots of days, used to be customary for the steward to seat them. When they come in like that, they come in and sit down.

Q. Then Mr. Henderson was in the middle of this aisle, this line of people, got out of line, come up to you?

A. To my best knowledge. I never saw him in the line. I saw him passing the line.

Q. You saw him in the middle, passing?
A. Walking toward the diner.
Q. He walked up to you, what did he first say?
A. That I could not recall, what he first said.
Q. What did you first say to him?
A. I asked him if he wanted to be served.
Q. Did you ask him what he wanted?
A. I asked him if he wanted to be served.
Q. What did he say?
A. He said, "Yes".
[fol. 201] Q. What did you say?
A. I said, "Well, you see we are crowded here, no seats available, but I will serve you in your space that you are occupying.
Q. You told him that the first time, in the first conversation?
A. That is correct.
Q. As I recall you testified on direct examination that he walked by these people and on into the diner or started into the diner?
A. That is right.
Q. Did you stop him?
A. Did I stop him?
Q. Yes.
A. Stopped to talk to him, sure.
Q. Did you stop him, did you tell him he couldn't go in the diner?
A. No, I didn't tell him.
Q. You told him he couldn't be served in the diner, but could be served in his space?
A. There was no space available for him to be served in the diner.
Q. Did you tell him he couldn't be served in the diner at that time?
A. He could see that.
[fol. 202] Q. You are not responsible. Answer if you care to, yes or no.
A. I didn't tell him he could not be served in the diner, no.
Q. But you did tell him he could be served in his space?
A. I did tell him that.
Q. You did say on direct you asked him to cooperate with you?

A. That is right.

Q. He was the only colored passenger you saw?

A. In the diner.

Q. Anywhere in the diner?

A. That is right.

Q. Did it occur to you you might have cooperated with him, having in mind these Jim Crow cars, to serve him and get rid of him then you would be free with your white passengers?

A. I wouldn't exactly answer that question by saying serving him and getting rid of him. I would have liked to have served him to both of our advantages, where he could get his meal.

Q. You are not answering the question. Did it occur to you you might have in that exigency have gotten rid of him, served him and let him go back quickly, by putting him at the Jim Crow seat?

A. If it was available, I would have seated him immediately. I would have been glad to have done it.

Q. You didn't?

[fol. 203] A. It wasn't there. It was occupied.

Q. You say when this white passenger or these white passengers sit down in these Jim Crow seats of their own volition, you don't ask them to move?

A. No.

Q. Is it a fact, then, if the Jim Crow seats are taken, or any one, at each table is taken and the colored passenger does not care to be served in his space, there is no provision for them, is that right? There is no provision for him to be served in the dining car at that particular time when that space he is supposed to be, or I say would be curtained off under existing conditions, was occupied?

A. That is right.

Q. If he doesn't care to be served in his Pullman there is no provision made, is there?

A. Well, under those circumstances, if he didn't care to be served in his Pullman, we naturally assume he didn't care to eat.

Q. With respect to these curtains, did he say to you that he did not care to eat behind this curtain, or words to that effect?

A. He didn't exactly say he didn't care to eat behind these curtains. He questioned the fact whether I could curtain it off after he did sit down there.

Q. Was there any talk about instructions, orders, regula-
[fol. 204] tions under which you were working?

A. I don't recall ever telling him about any instructions or anything of that kind.

Q. Are you instructed with regard to colored passengers?

A. Certainly.

Q. Are those instructions oral or written?

A. Both.

Q. What are the oral instructions?

A. The oral instructions were to use——

Q. First, excuse me, will you, Lieutenant, from whom do you get those instructions?

A. Superintendant of dining cars.

Q. What are those oral instructions?

A. Now, listen, the oral instructions are from, could be from the agent, could be from the inspector.

Q. You get them from employees or servants or agents of the company, your supervisors?

A. That is right.

Q. What are those instructions?

A. To always serve the colored passenger to the best, to his and our best advantage.

Q. Is that all?

A. That is all.

Q. That is the only oral instructions?

A. That is all I ever received.

[fol. 205] Q. Have you been instructed to reserve these tables, these two end tables for colored people?

A. Yes, I have been instructed to reserve it for only a certain length of time. If there is no colored passengers occupying them, then to turn them over to white passengers.

Q. Is that instruction oral or written?

A. As I recall, that instruction was both oral and written.

Q. Will you show me the written instruction?

A. I don't have it.

Q. Are you positive or not whether it was written or published?

A. To my best knowledge. I wouldn't be positive. To my knowledge it was written.

Q. I don't quite understand, to your knowledge it was. Would you say it was or was not?

A. I would say to my knowledge it was.

Mr. Clark: Right on that point. You will excuse me. I may help matters by explaining I intend later to put on a witness to prove the circular of instructions, if you would like to have it read now.

Mr. Lawson: No, I am glad to know. I will reserve. I think it will be more logical to reserve it until that time. If you want to reserve it later.

Mr. Clark: He is not in the room now. He is a witness quite important to the operation of the railroad. I can't have him sit here the whole morning. As I understand it is [fol. 206] Mr. McClain, Assistant Vice-President, Chief Transportation officer. I will have him come down to read this.

Mr. Lawson: Yes. I think it will be proper to do that.

By Mr. Lawson:

Q. The question is there any other instruction, oral instruction?

A. Not to my knowledge.

Q. Under those oral instructions, then, you were required to reserve these colored tables, if white people don't want to use them?

A. I can explain that to you this way. For instance, the tables were vacant, there was a white passenger and a colored passenger standing at the end of the dining car, the colored passenger would be given preference to those tables because it was set off for their use. But in the event there was no colored passenger there, and a white passenger occupied the table, then when the colored passenger came in, we would not seat the colored passenger with the white person.

Q. Suppose the tables were vacant and suppose further that the diner was pretty well crowded, but the vacant tables, the Jim Crow tables were vacant and simultaneously a white and colored passenger came in, which one would you seat first?

A. I think I answered that before when I said if they both came in at the same time or simultaneously, I would seat the colored passenger first.

Q. Suppose there was one white person sitting at the [fol. 207] big table, a four-seated table, and a colored passenger came in, you would not seat him?

A. I would seat him at the other table, the small table.

Q. Suppose that white passenger was almost finished eating, another white passenger was waiting to take that seat, this negro passenger was waiting, would you serve the white or negro passenger?

A. I don't see how you can determine how anybody is almost finished eating.

Q. Suppose he is eating dessert, you are expecting him to leave shortly, another white passenger came in, you knew he wanted to eat at that table, this colored passenger was waiting, what would you do?

A. You are assuming all the rest of the seats in the dining car are occupied?

Q. I am assuming most of them are.

A. Most of them are, and there was other available space, I would seat the white passenger up in the available seats.

Q. In view of that situation, why wouldn't you ask the white passenger to move from a Jim Crow table once he had sat down there with a negro waiting?

A. I would.

Q. You said while ago you wouldn't.

A. I said I would not? I don't recall that.

Q. Did you on direct examination?

[fol. 208] A. I don't recall that.

Q. If there is a difference, what is the correct answer to that?

A. You are asking me?

Q. Yes.

A. The answer is he asked me if there was a colored passenger waiting and there was other available seats, what, I assume in the dining car, that I would not ask the white passenger to move back and take the other seat? I don't recall saying I wouldn't do that. I did say that in previous testimony that if a passenger coming to the dining, came in and sat down, I would not request him to move, where there was no occasion to ask him to move. I didn't say if there was a colored passenger waiting.

Q. I misunderstood you then.

Suppose white people were seated at the Jim Crow table and there were vacant seats in the body of the car, the diner. Would you seat a negro up there?

A. In the body of the diner?

Q. Yes.

A. No.

Q. So this reservation is not absolute, is it?

A. No, sir, it is not absolute.

At that time it wasn't done. I don't know whether it is now.

Q. I am talking about at that time.

[fol. 209] Exam. Johnson: Lieutenant Farrell, as far as your instructions go, the instructions you receive, the treatment accorded Mr. Henderson was the same as these other colored people that enter your diner?

The Witness: Yes.

By Mr. Lawson:

Q. Lieutenant Farrell, it is the general practice of your company to offer to serve negroes in their space if these reserved tables have white passengers?

A. If they are occupied, yes. It was the policy of the railroad conveyed to me by the railroad to give just as much attention to colored passengers as white passengers. I didn't particularly discriminate. The only thing was that I ever did was to make both parties concerned satisfied.

Q. Did you undertake to satisfy Mr. Henderson in any other way than to offer to serve him in his seat?

A. That was the only way I could.

Q. When he told you—when you told him you would send for him when the situation changed, why didn't you send for him?

A. The situation never changed.

Q. Never changed?

A. No.

Q. At no time was there a vacant seat at the Jim Crow table?

A. There could have been a vacant seat but not a vacant table now.

Q. At all times white passengers were sitting at one or [fol. 210] both of the tables?

A. Yes.

Q. Were there times when there were other vacant seats at other tables?

A. Well, I don't recall whether there was or not. As I recall there was mostly a line of people waiting to sit down. If there was available seats, there would be no occasion for a line of people to be standing up.

Q. If you wanted, as you say you did, to give this service to this colored passenger, wasn't there a time if you really wanted to, when you could have sent the waiter for him and reserved space for him?

A. No.

Q. You couldn't have done that at any time?

A. No, not at any time.

Q. Was there any discussion between you and Mr. Henderson about the laws of the states, Jim Crow laws, which required you or the company to do certain things?

A. Yes.

Q. What was that discussion?

A. I told him we were passing through a state, I said that this is no law of the Southern Railway, it is not discrimination on my part, but they do have in this state a Jim Crow law.

Q. What state were you referring to?

[fol. 211] A. It was in Virginia or North Carolina. I think it was Virginia, when I first saw him.

Q. The second visit, what was the state?

A. It could be Virginia.

Q. It could be Virginia, but was it?

A. I don't remember.

Q. Do you know whether or not the laws of Virginia and North Carolina are the same regarding this situation?

A. Not being a lawyer, I couldn't say.

Q. Is there any instruction from the company as to the law, to you? Does the company advise you or instruct you about the laws of these various states?

A. The company never discriminated between states.

Q. That isn't my question. In your oral or written instructions, does the company undertake to suggest to you what the various laws are?

A. Of the states, no, they don't.

Q. As I understand it, you have the discretion to determine when a colored passenger should be seated, is that right?

A. I have discretion to determine what colored passenger should be seated?

A. If the car is crowded, there are white people at these Jim Crow tables, you think they are going to be there for some time, it is in your power to say to this colored passenger we will serve you in five minutes or whatever in your discretion you can do it?

[fol. 212] A. That is right.

Q. If you had a white passenger eating at the Jim Crow table and he let us say is half through his meal, and another white passenger comes in and a colored passenger comes in, it is within your discretion to determine whether or not you should seat this white passenger in preference to the colored passenger, is it not?

A. That is right.

Q. So that the application of whatever rules or regulations or laws which are in effect in that situation, you had the power to apply, didn't you?

A. I don't know whether I have the power or not. Anything I would do there would be personal.

Q. It is within your discretion, you can do whatever you think is best in that situation?

A. Yes, what I think best.

Q. Under that situation, that policy, you could if you wanted to, see that a colored person never got seated, all you would have to do is say, "Well, this first passenger"——

Mr. Clark: That is a matter of argument.

Mr. Lawson: This is hypothetical. This man is an expert witness and this is a hypothetical question.

Mr. Clark: If it is a hypothetical question, there is no fact on the record on which to base it.

[fol. 213] Mr. Lawson: I can ask a hypothetical question from the expert witness.

Exam. Johnson: Ask the question. Let us see.

Mr. Clark: He is a simple man in charge of a dining car. He is no expert. It is a simple fact. Counsel wants to turn this into a hypothetical question. This is argument. He has a very weak ground in both instances.

Mr. Lawson: I will go along, but I think he has answered the question.

Exam. Johnson: Are there any other questions?

By Mr. Lawson:

Q. You say that this complainant could have gotten service at Greensboro, is that right?

A. He could have, yes.

Q. Do you know whether or not as a matter of fact on this Sunday night this man was selling sandwiches?

A. No, I don't know whether on that night or not. It was customary for him to be there.

Q. Do you know whether or not the colored people can be served in the railway station at Greensboro?

A. That wasn't in the enclosure. That was on the platform. They sell to anybody.

Q. I am talking about another situation. Do you know whether colored passengers can be served inside the resturant there?

A. That never concerned me.

[fol. 214] Q. You don't know?

A. I don't.

Q. You don't know whether these people were selling sandwiches on this particular night, do you?

A. I didn't see them.

Q. You don't know whether this complainant on May 17 or early morning of the 18th could have gotten other dining car facilities in Greensboro, do you?

A. I can only go by saying that he could, because just the same as I would say that I don't know whether the Willard or Mayflower Hotel are open today. It might be closed up a whole day.

Q. You don't know whether on this particular day he could have gotten food because you say you did not know the man was there selling sandwiches, you don't know, you say, that he could be served in this restaurant?

A. I couldn't say he could have got it. Naturally that would have been a hard question to answer. Greensboro could have sold out of food.

Q. You don't know?

A. I don't know.

Exam. Johnson: How long does the train stand there at the station in Greensboro, this particular train?

The Witness: Usually about fifteen minutes. You see we take the diner off there, move that, then hook the Pullmans [fol. 215] back to the train, which takes approximately fifteen minutes. I have seen it stay longer than that. I have seen it stay——

Exam. Johnson: An average of fifteen minutes?

The Witness: Yes.

By Mr. Lawson:

Q. You don't consider it good service by your company if a passenger is compelled to, interstate passenger is com-

pelled to get off the train, go look for food in Greensboro, do you?

A. I had nothing to do with that at all.

Q. I know you don't. Do you consider that the company, the Southern Railway is rendering good service, if under these circumstances a passenger is forced to get off——

Mr. Clark: That is one of the issues that is here, whether or not adequate and sufficient and equal services and so forth, in this dining car business, is under attack. That is for the Commission to say.

Mr. Lawson: That is why I am asking this question.

Mr. Clark: I don't think so. The witness is testifying as to facts. His opinion as to whether the service is this or that or not is a question for the Commission.

Exam. Johnson: Are there any other questions? All right.

Mr. Lawson: I believe that is all.

Exam. Johnson: Anything on redirect?

Mr. Clark: Yes.

[fol. 216] Redirect examination.

By Mr. Clark:

Q. I am not sure I followed you in response to cross-examination in respect to this discretion; you were talking rather rapidly. I am not sure whether I have it clear. Of course, now, you were the official in charge of the diner, that is clear?

A. Yes.

Q. So far as your being in charge, there is a certain amount of discretion in the handling of passengers, your waiters, the service, and all that. There is no doubt about that, I take it?

A. That is correct.

Q. Undoubtedly you would not be in charge.

A. That is right.

Q. Do I understand there is any discretion bested in you to mix the races, as it were, at the tables in violation of what you told us was a rule and method of the company given you to follow? There is no discretion on you about that, is there?

A. No, sir.

Q. I take it insofar as this discretion is concerned, that has nothing to do with the clear cut statement of how you operated your car?

A. No.

Q. That was a matter of a clear cut statement of fact. There is no discretion one way or another about the details [fol. 217] of handling your passengers and seating them?

A. No discretion about that.

Mr. Lawson: Your instructions were verbal and written as you have testified?

The Witness: Yes.

Mr. Lawson: The application of those instructions would be, certainly the oral ones would be dependent on your discretion, wouldn't it?

The Witness: There would be no interpreting the word "discretion". I wouldn't say there would be any discretion.

Mr. Lawson: You don't mean to say in a crowded situation and in an emergency, you wouldn't do what you think is best under the circumstances, would you?

The Witness: I would do what I thought was best under the circumstances, yes.

Mr. Lawson: That is discretion.

Exam. Johnson: You were through?

Mr. Lawson: Yes.

Exam. Johnson: You are excused.

(Witness excused.)

Mr. Clark: Off record.

(There was a discussion off the record.)

Exam. Johnson: On the record.

[fol. 218] John White was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Would you give your name and tell us where you live at the present time?

A. John White, 1116 Columbia Road Northwest, Washington, D. C.

Q. Are you in the employ of any railroad?

A. Southern Railroad.

Q. How long have you been in the employ of the Southern Railroad?

A. 28 years.

Q. At this time what capacity, what connection were you employed?

A. Dining car service as a waiter.

Q. How long have you been a dining car waiter?

A. Since I have been there, 28 years.

Q. At this time, do you still run on the diner that operates on train 35 out of Washington?

A. Yes.

Q. The complainant in this case on hearing refers to an incident that occurred on May 17, 1942, that is, last year. The complainant is Elmer W. Henderson that you see here. On that date, I want to know if you remember seeing the complainant here?

A. Yes.

[fol. 219] Q. Do you remember seeing him?

A. Yes.

Q. Where was he?

A. He was standing in front of the buffet in front of the dining car.

Q. In your dining car?

A. Yes.

Q. Would you in your own way, John, just tell us first what tables you served, what your station is, as I believe you technically call it. I want you to tell us about when you first saw him, what happened, when you second saw him, if you did see him a second time, and so forth. Tell us in your own way what you saw and heard about it. I don't mean what you heard from Mr. Farrell, what you may have heard from the complainant, Elmer W. Henderson. Go right ahead.

A. My tables are 1 and 2 tables. The 1 table, No. 1, is the first table on the right, seats two people. No. 2 is a four-seat table on the left.

Q. That is coming from the kitchen end?

A. Coming out of the kitchen end into the dining car. Of course, when I first saw Mr. Henderson, he was standing in front of the buffet. We were busy serving.

Q. Right there, describe the location of the buffet with respect to the aisle and end of the car. Describe that some way.

[fol. 220] A. Well, coming from the kitchen end, it is all to the left, and it is at the door going into the pantry to the right. That is, coming into the dining car.

Q. Is the buffet generally at the end of the aisle, at the kitchen end of the car?

A. Right at the end of the car, just before you enter into the pantry.

Q. Kitchen and pantry on one side the little aisle, round the kitchen end on the other?

A. Yes.

Q. That is the kitchen end?

A. Yes.

Q. When you first saw him, he was standing there. Could you tell us about what time that was, if you know. Go ahead and tell us what happened.

A. I don't know exactly just what time it was. It was shortly after we made the call.

Q. Made the call for dinner?

A. We usually made the call around 5:30.

Q. That is the call for the dinner meal?

A. That is right.

Q. Go ahead. You saw him there. Did he approach the steward?

A. I saw him there talking to the steward. I didn't pay any attention as to what he was talking about or nothing. I happened to see him standing there.

[fol. 221] Q. Was there any commotion incident to this conversation?

Mr. Lawson: I think that is a little too leading. The witness can testify. Mr. Clark is telling him what to say, more or less.

Mr. Clark: I am certainly sorry. I asked him if there was any commotion. I don't think that was leading. I will withdraw the question.

By Mr. Clark:

Q. What happened when you saw him there talking with the steward?

Mr. Lawson: That is all right.

The Witness: I didn't see anything happen.

By Mr. Clark:

Q. Nothing happened. They were just talking. What did the passengers do?

Mr. Lawson: *O* object. He said he saw nothing and nothing happened. I don't think he ought to keep leading him. I object.

Mr. Clark: I said nothing happened, what did the passengers do?

Mr. Lawson: That something happened?

Mr. Clark: Certainly there is nothing leading when I asked him what the passengers did.

Mr. Lawson: He answered he saw nothing, heard nothing.

Mr. Clark: The passengers would be standing there yet under your theory.

Exam. Johnson: Tell us what the situation there was.

[fol. 222] The Witness: The only thing I know when we opened the dining car, shortly after we opened it, I saw Mr. Henderson standing there. He and Mr. Farrell were talking. Just what the conversation was, I don't know. Of course, I was busy working.

Mr. Clark: We have still got them talking there. We can't leave them there forever. What was the next step?

Mr. Lawson: I object. I like to be liberal. Mr. Clark is just playing with us here. He said he didn't see anything, then he says what happened next.

Exam. Johnson: I think, Mr. White, you meant you didn't see anything out of the ordinary.

The Witness: What you mean what happened? You know I was working there. Nothing happened as I know, just people coming there standing up, you know. Just as I was going to tell you, Mr. Henderson came there, stood up for a few minutes, he and Mr. Farrell were talking, after which I didn't seem him, he was gone.

By Mr. Clark:

Q. Then did you see him again?

A. Later on, he came back. I don't know whether I said to him the first time he was there or the second time, would you like to be served in the car, and he said, no, thank you. That is all.

Q. You said that to the complainant?

Exam. Johnson: You said in his seat?

The Witness: I said, would you like to be served back in his car, I didn't say Pullman seat or anything. I said, in his car.

[fol. 223] By Mr. Clark:

Q. What did he say to that?

A. He said, no, thank you.

Q. He did not wish to be served. That is twice you recall seeing him. Do you recall seeing him an additional time?

A. Those are the only times I saw him.

Q. You recall twice?

A. That is right.

Q. There at the time you first saw the passenger, would you tell us whether or not your seats, the tables that you serve, 1 and 2, was anybody at those tables?

A. Yes, there was.

Q. Were they white passengers?

A. Yes.

Q. The second time he came in, do you recall whether anyone was occupying those tables?

A. They were.

Q. What was the general situation, if you know, with respect to the number of diners in the body of the car? Was it empty? Full? Or how would you describe it?

A. Well, I imagine it was just coming and going. The diner was, you know, continuously filled up from the time we started until we quit serving. You know the people are coming and going, you see.

Q. You said you had a pretty good crowd of people as you started out and then they were coming and going throughout the trip, is that it?

[fol. 224] A I don't know I exactly follow you.

Q. Could you tell us how the passengers came in, who wanted to be fed, was it a good crowd or how would you describe it?

A. We seemed to be pretty rushed at the start, you know, then people just coming and going.

Mr. Clark: I believe the 17th, the calendar will show that was on Sunday. Am I right about that? Does anybody recall?

Mr. Henderson: It was Sunday.

By Mr. Clark:

Q. I want to ask you, John, does Sunday or week end make any difference in the crowd or number of persons that have to be fed in your diner?

A. Yes.

Q. More or less on those days?

A. Usually more.

Q. Do you recall whether or not when your car was cut off at Greensboro all your passengers had been fed who wished service that day?

A. I don't know.

Q. You don't remember?

A. No.

Q. Is it a fact that sometimes you are not able to serve all who seek to be served?

A. Yes.

Q. You served the two stations that have been referred to here as "Jim Crow" tables, did you? They are the ones that are cut off or could be cut off by a curtain?

A. Yes.

[fol. 225] Q. Describe to us how that curtain when it is applied pulls out, how it works? Could you give us a description of that so the Examiner will understand?

A. Exactly the same as that curtain hanging there, that is drawn, it is just like that, that aisle for you to walk through.

Q. Not so fast, now we will let you describe it. There is a window here in the room, there are curtains extending out some inches, there is a space or gap between the two curtains?

A. That is right.

Q. Do I understand these two side pieces of curtains are representative of the curtains that would hang between your tables and the ones next to you?

A. Yes.

Q. But would not extend across the aisle?

A. Yes.

Q. In other words, the curtain is just straight across like that, if I may describe it. Straight across, across the car, not longitudinally, not the length of the car, but across the car, is that what it is?

A. Yes, that is right.

Q. Do you remember on this particular occasion, if you do, whether the curtain was drawn or whether it was back against the side of the car?

A. Back against the side of the car.

Q. Had not been drawn?

A. If it was, I don't remember.

[fol. 226] Exam. Johnson: Is that curtain in two parts?

The Witness: Yes.

Exam. Johnson: Like a window pair of curtains?

The Witness: Yes.

Exam. Johnson: Drawn together in the center?

The Witness: Yes.

Mr. Clark: As I understand the witness, it doesn't cross the aisle to the middle of the car.

Mr. Lawson: Just crosses the tables.

The Witness: Crosses the tables. They would be, when you pushed them back, against the wall, they are open. When they are drawn like that, they are for the colored passengers.

Mr. Clark: It doesn't surround the tables?

The Witness: No, just up to the aisle. You have got to have a passage way there. You draw the curtains up to the aisle just the length of the table.

Exam. Johnson: It separates the two tables?

The Witness: Yes.

By Mr. Clark:

Q. In your experience and service, have you had occasion to serve colored passengers in your car and at your table?

A. Yes.

Q. Do you have very many of them to be served?

A. Yes, a good many now.

Q. Nowadays you have quite a good many?

A. Yes.

[fol. 227] Q. This particular trip, did you have more than one passenger, complainant in this case, or did you have more colored passengers, or do you remember that date?

A. He is the onliest passenger I seed.

Q. Only one you recall on that trip?

A. Yes.

Q. I am not sure we are clear. You saw this passenger on two occasions. The first time you told me there were

persons waiting to be served, if I am right. I don't think I asked you about the second trip he came in. What was the condition with respect to passengers being served or waiting to be served the second time he came in, do you remember?

A. The second time he came in, passengers were still standing.

Q. Your testimony is he came twice. You said the first time there were persons waiting.

A. Yes.

Q. My attention has been called I didn't ask you about the second trip. Tell us if you remember about the second trip he paid to the diner.

A. Was anyone waiting, you asked me?

Q. Yes.

A. Yes.

Q. What was the situation, a crowd?

A. Still people waiting.

Q. Both instances, both times he came, your answer is that there were white persons sitting at the so-called "Jim [fol. 228] Crow" tables, is that right?

A. Yes.

Mr. Clark: You may cross examine.

Cross-examination.

By Mr. Lawson:

Q. Mr. White, you have been on this diner for 28 years in dining car service?

A. Yes.

Q. On this train 35, you were in charge of these "Jim Crow" tables, so-called?

A. Yes.

Q. Did you have instructions regarding these tables? Did your steward or anybody else tell you anything about those tables?

A. No, other than, well, they put those curtains up there, you see. They said the curtains were supposed to be used for colored passengers.

Q. Who told you that?

A The steward, he gets all instructions, and tell us.

Q. These curtains are used all the time Negro passengers sit at those tables?

A. Yes.

Q. Those curtains, you say there are two of them?

A. Yes.

Q. One comes one way, keeps the aisle open, one comes to the aisle, keeps a clear passage?

A. Yes.

[fol. 229] Q. The point where those curtains meet is at the corner of the table, is it?

A. Yes.

Q. Use them clear round?

A. Yes.

Q. Is it not a fact that in the summertime back behind those curtains it is hot and warmer than in the other part of the diner?

A. No, you see the diner is air-conditioned. It has about the same temperature.

Q. Those tables or rather curtains hang down across to the table, there isn't space between the table and curtains, is there?

A. You mean from the floor?

Q. No, the curtains come down to the floor?

A. Yes.

Q. There isn't much space between these curtains and the table? The curtains come down pretty much like that?

A. Yes, right down across to the chair.

Q. The negroes are completely obscured when those curtains are drawn unless you open the curtains?

A. When both of them are drawn, yes.

Q. That is what I mean. You find it more difficult to serve colored passengers in that small space than you do in the body of the car?

[fol. 230] A. We serve from the opening of the curtains because the curtains are hanging on the side.

Q. Interferes with the passenger?

A. It is right behind the passenger.

Q. It is not as comfortable to the passenger back there as it is in the body of the car, is it? You understand me?

A. I couldn't say whether it was or not. I never heard anybody complain about that.

Q. From your observation, seeing the curtain there, seeing the people behind it, could you say it is as comfortable and convenient as the seats in the body of the car?

A. I am afraid to say that, because I haven't heard any-

one complain. I don't know whether they would feel uncomfortable behind there or not.

Q. Do you think you would feel uncomfortable behind there? You understand me, Mr. White. We are trying to get at the truth of this. Nobody is going to bother you. You are going to have your job and everything. Nobody is going to bother you. I just want you to tell the truth. Do you think it is convenient and comfortable back behind the curtain as it is out in the body of the car?

A. Well, the curtain is just hanging behind the chair. I don't know. I couldn't say. It seems just the same to me. I couldn't say yes or no.

Q. I guess it would. Let me get at this a little different. One curtain comes from the wall?

[fol. 231] A. Yes.

Q. The other curtain comes from the other wall, so you have two curtains meeting, you already testified, at the corner of the table?

A. Yes.

Q. How do you get in behind?

Exam. Johnson: I don't understand it that way.

Mr. Clark: He is putting words in the witness' mouth, Mr. Examiner. There was never any testimony that the curtains meet. They meet the corner of the table.

The Witness: Here is a table on this side and this table on the other. The curtains would come to here (indicating).

(Discussion off the record.)

By Mr. Lawson:

Q. Where was Mr. Henderson the first time you saw him?

A. Standing in front of the buffet.

Q. How long was he standing there at the buffet?

A. Maybe ten or fifteen minutes, I don't know exactly.

Q. When you first saw him, how many white passengers were at the big table?

A. I don't know.

Q. Was there one?

A. It was more than one, but I don't know exactly how many.

Q. But it wasn't full?

A. I am not sure but I think it was three. I am not quite sure of that.

[fol. 232] Q. How many at the small table?

A. Two.

Q. That was full?

A. Yes.

Q. So there was a vacant seat at the larger "Jim Crow" table?

A. Yes.

Q. When he came back the second time what was the situation with respect to those two tables?

A. I don't remember now.

Q. Was there anybody there?

A. Yes, there was some one there, just how many I don't know.

Q. The tables were not full? There were still vacant seats?

A. Those two tables?

Q. Yes.

A. I don't know.

Q. Certainly the first time there was at least one vacant seat.

A. I am pretty sure there was one at the big table, that is at the table that will seat four. I am sure of that.

Q. The second time he came back you are not sure whether there were any vacant seats.

A. No, I am not sure.

Q. Do you know whether there were any vacant seats in the body of the car?

A. No, I am not.

[fol. 233] Q. How long has the Southern Railroad been using this curtain to your knowledge?

A. About a year, I guess.

Q. Does this situation happen often, that is to say, are colored people not served often? Understand me now. Are the dining cars so crowded at times that Negroes have to wait or be served at their Pullman seats, or does this thing happen frequently?

A. Well, since they put this curtain up there, they usually take care of them pretty nicely.

Q. What do you mean by that?

A. I mean before they put the curtains up there, they would have to wait until the white passengers were served or be served back in the cars, you see. Since they put the curtains up there, if the whites are sitting there, after the whites finish, they would seat the colored. That is why I would say we would take care of them better.

Q. What has the curtain to do with the crowded condition or taking care of the passengers?

A. What has the curtain to do with it?

Q. You mean to say that since the curtain has been up there, there have been fewer passengers?

A. Colored passengers?

Q. Yes.

A. More colored passengers.

[fol. 234] Q. They have been taking care of those colored passengers more readily since the curtain?

A. That is right.

Q. Why is that?

A. Because before they had the curtains, they didn't have no way to "Jim Crow" them off from the whites, you see. They would all be the same place.

Exam. Johnson: In that case, the colored were not served then, before you had the curtain, until all the whites were served?

The Witness: Yes.

Exam. Johnson: Now you can serve them provided those tables are vacant?

The Witness: That is right.

By Mr. Lawson:

Q. At the same time you are serving the whites?

A. Yes.

Q. But you can't serve them behind that curtain if any white person is sitting there. At the "Jim Crow" tables when white passengers are sitting there, you are instructed not to serve colored people, aren't you?

A. Say that again.

Q. When there are white people at the "Jim Crow" tables, you are instructed, are you not, not to serve colored people?

A. No, I have never. My instructions are to serve anybody that sits down there.

[fol. 235] Q. Why don't you, under that instruction, why don't you serve a white person and a colored person, if they both sit down at the same time?

A. I do it quite often.

Q. You have colored and white people?

A. Sitting down at the same table.

Q. Why didn't you seat Henderson at that vacant seat at the table with four seats?

A. I don't do that. The steward does that.

Q. Do you know whether the steward made any attempt to seat Mr. Henderson that day?

A. I saw the steward and Mr. Henderson talking. What the conversation was, I don't know.

Q. Did you see the steward and Mr. Henderson walk toward that table?

A. I didn't see them walking at all.

Q. They were standing still?

A. When they were talking.

Q. Do you pull the curtain when a white person and a colored person are sitting at the same table?

A. No, I don't pull the curtain at all.

Q. The steward does that?

A. Yes.

Q. Does the steward pull it when there is a white person and a colored person sitting at the same table?

A. No.

[fol. 236] Q. It isn't pulled?

A. No.

Q. Let me clear up this one point. I am not quite clear. I want to get your final statement. When there is a white person sitting at the "Jim Crow" table, do you seat a colored person?

Mr. Clark: The witness said the steward seats them. He serves them after they are seated. That isn't the evidence of this witness.

Mr. Lawson: That is right.

By Mr. Lawson:

Q. Do you know what the custom is when a white person is seated at the "Jim Crow" tables and a colored person is seated there? Do you know what the custom is?

A. What the custom is?

Q. What the practice is? I mean does the steward come and seat this colored person? Does he tell him to wait? Does he send him to the Pullman car, or does he give him another table?

A. You mean if they are both sitting there?

Q. No, if the white passenger is sitting there, the colored person comes up to that table intending to sit there, what is the practice?

A. That is, whether the steward would seat the colored down with the white or not, is that what you want?

Q. Yes.

Exam. Johnson: Do you know?

The Witness: No.

[fol. 237] By Mr. Lawson:

Q. You see what goes on?

A. No, I don't see everything that goes on. I am busy. I will tell you what happens. Quite often white people come and sit down with colored people. I would leave you sitting there. I would go to the kitchen and come back and see whites sitting there.

Q. Is that a common practice? Does that happen quite often?

A. Quite often now.

Q. What would happen if a white person were sitting there and a colored person went and sat of his own accord at that table? Not saying the steward doesn't seat him, he just goes and sits down there with this white person.

Mr. Clark: There is no proof that ever happened. How could this man say what would happen?

Mr. Lawson: I am laying the foundation for that.

By Mr. Lawson:

Q. Does it ever happen?

A. Does the colored sit there, the white come and sit down?

Q. You answered that that happened.

A. I answered the white would come and sit there, didn't I?

Q. I am confused now. Here is a white passenger sitting there.

A. Yes.

Q. Does it happen often that while a colored person is sitting at the table, a white person comes and sits at that table, does that happen often?

A. It doesn't happen often, but it does happen.

[fol. 238] Q. Does it happen that while a white person is sitting at that table, a colored person comes and sits down there?

A. That doesn't happen.

Q. You have never seen that happen, never in your 28 years have you seen a colored person sit down at the table with a white person?

A. I say it doesn't happen often. I have seen it.

Q. What happened at the time you saw it?

A. Well, there didn't anything happen.

Q. You served them?

A. Yes, indeed.

Q. Did the steward object to it in any wise?

A. No.

Q. Did he say anything to you about it?

A. No.

Exam. Johnson: Any other questions?

Redirect examination:

By Mr. Clark:

Q. Do you number the tables by stations?

A. Yes.

Q. You said yours were 1 and 2?

A. Yes.

Q. No. 1 is on one side, is that the little table or the big table?

A. That is the little table.

Q. That is on one side, No. 2 is across the aisle from it?

[fol. 239] A. That is right.

Q. All the little tables, I take it, are odd-numbered tables?

A. Yes.

Q. All the big tables are even numbered tables?

A. Yes.

Q. So you number them across that way, criss-cross?

A. Yes.

Q. When you hang this curtain which is suspended from the top of the car on a rod, pushed back against the side of the car, when you bring that curtain into use, first from one side you pull it out so it hangs down between tables No. 1 and No. 3, is that right?

A. That is right.

Q. On the other side, you pull it out, it hangs down between tables No. 2 and 4, is that right?

A. That is right.

Q. It is just as near to table No. 3 as it is to Table No.1, isn't it? The curtain hangs down then between the two tables.

A. Yes.

Q. Isn't that similarly true between tables No. 2 and No. 4 on the other side?

A. That is right.

Q. Are those curtains ever pulled so they meet across the aisle between the two tables?

A. No, sir.

[fol. 240] Q. Are they turned down the side lengthwise of the aisle so as to surround the table?

A. No.

Q. It is just between the two tables on either side of the car, is that true?

A. Yes.

Recross-examination.

By Mr. Lawson:

Q. You say now they serve white and colored people together more frequently.

A. Yes.

Q. When did they start doing that?

A. They started doing that, well, since the war.

Q. So that it was after May 17, 1942?

A. You mean that they started serving white and colored together, is that what you mean?

Q. Never mind what I mean, I want to get what you mean?

A. I want to understand what you are trying to ask me so I can answer you.

Q. You said since the war they have started serving white and colored people together.

A. Ask that question again, please.

Q. When did the Southern Railway start serving white and colored people together?

A. As to the date; I don't know.

Q. You said since the war, is that true?

A. Yes, since the war.

[fol. 241] Q. When did the war start?

A. I don't know.

Q. How do you know then it was since the war.

A. Because I know the war was going on.

Q. The war was going on when it started?

A. Yes.

Q. If the war started December 7, 1942, it was not going on when they were not serving these people May 17, 1942, were they?

Mr. Dixon: We all know when the war started.

Mr. Lawson: Apparently he doesn't. We want to get this witness straight. I don't want to confuse you.

The Witness: Will you straighten me out?

By Mr. Lawson:

Q. You said simply they started serving white and colored people sometime after the war started.

Mr. Clark: He never said anything of the kind. He made it perfectly clear that where the witness became confused. I think I must object to it on cross examination. It is hardly fair to the witness. He said very clearly that if there was a colored passenger sitting in the diner at one of the seats at the so-called "Jim Crow" table, and a white person came and sat down he would be served. He made that perfectly clear.

Mr. Lawson: That is right.

Mr. Clark: He asked about seating them. He said he doesn't seat them. He said I will be in the kitchen or pantry, I will come back and find the white person sitting there, [fol. 242] I will serve him. Then he reversed the order of things. It happens he may find colored and white persons sitting at the same table. He never said the steward sat them there, that there has been any change in the rule or policy of the Southern Railway in respect to serving. Those questions being put into the witness' mouth, I don't think fair cross examination.

Mr. Lawson: He did testify that if a colored person sat down by a white person he would serve him.

Mr. Clark: With the explanation if he found them there, it didn't make any difference, he would serve them.

Mr. Lawson: That is my point exactly.

Mr. Clark: I know you got the witness to the point where the Southern Railway served him and the date.

Mr. Lawson: He testified what you said at first. He also testified if this colored man sat down by the white man he would serve them.

Mr. Clark: That is right. He would have done that. The entire history, there has been no starting or change or anything about it.

Mr. Lawson: He said that, this witness said that did not start until after the war.

That is what you said?

The Witness: What?

Mr. Lawson: Serving white and colored people.

The Witness: I want you to ask me that over again, get me straight on it.

[fol. 243] —Redirect examination.

By Mr. Clark:

Q. I understood you to testify on cross-examinaton that if a colored person were sitting at one of your tables in the so-called Jim Crow tables, of course you would serve him. Would it be possible for a white person to come in and seat himself at that table? Could that happen?

A. Sure that could happen.

Q. If you then found a white person with a colored passenger at one of your tables, I take it you would continue and serve him, is that true?

A. Yes.

Q. Just at the close of your cross-examination there was some question asked of you as if there had been some change in the rules of handling this matter by the Southern Railway, and you made some reference to the war or something, since the war, I have forgotten exactly how it arose. I want you to tell me what you had in mind with respect to any change that might come about incident to the war situation, and the troops who travel over the road, would you explain that to us, about the mixing of the races?

A. Just as I said they have so many soldiers both colored and white, when they come in the dining room, the steward does not make any difference. He just lets them sit down there.

Q. They are soldiers as far as he is concerned.

A. That is right.

Q. In that case, if they were seated at your table, you [fol. 244] would serve them?

A. I would serve anybody that sat down there.

Q. As far as you know, has there been any change in the steward's method of handling civilian passengers in recent years? I mean since you got the curtains.

A. Since we have got curtains there has been a change, you see.

Q. That was a change?

A. That is right.

Q. Up to the time you got the curtains, you tried to seat them and serve them after the whites had been served?

A. That is right.

Q. You put the curtains up that enabled them to be served while the whites were being served?

A. That is right.

Q. Otherwise, we have been going along that way since?

A. That is right.

Mr. Lawson: Every time a colored person sits at that table you draw the curtain?

The Witness: A civilian.

Recross-examination.

By Mr. Lawson:

Q. You don't draw the curtain when colored soldiers sit there?

A. No.

Q. When a white and colored person are sitting there, the colored person was there first, then the white person, do you [fol. 245] keep the curtain drawn or do you push it back?

A. You mean a civilian?

Q. A civilian.

A. They come and sit right down behind the curtain, the white.

Q. You don't push the curtain back?

A. Yes. I don't push it back. It is pushed back.

Q. The moment the white man sits down, the curtain goes back?

A. Sometime they push it back themselves. The white passenger comes and sits down and pushes it back.

Q. Does the colored person ever push it back?

A. Yes, I have seen them push it back.

Q. Does it stay back? The steward, when he sees it pushed back comes and draws it again, or does anybody?

A. I don't remember seeing him drawing it after he pulled it up and somebody pushed it back.

Mr. Lawson: That is all.

Exam. Johnson: You are excused, Mr. White. We will adjourn for lunch until two o'clock.

(Whereupon, at 12:50 p. m. the hearing adjourned until 2:00 p. m.)

Afternoon Session

Two p. m.

Exam. Johnson: Are you ready to proceed?

Mr. Clark: Yes.

Mr. Lawson: Yes.

[fol. 246] Mr. Clark: I will call Lieutenant Farrell.

Exam. Johnson: In regard to the deposition, your motion?

Mr. Lawson: I move the deposition of Lieutenant Farrell taken at the date and place as shown be admitted as part of the record.

Exam. Johnson: I feel that since Lieutenant Farrel is here and gave oral testimony, that that in fact is the best evidence. I am going to refuse to accept the deposition and make it a part of the evidence.

Lieutenant Farrell is here on the stand. If you have any further questions of him, why ask them at this time. We will be a little liberal in that, whether it is cross-examination or not. It might be a little leading, but we will clear this up. I don't think it will be any different than from what already has been given.

Mr. Clark: I hope my position with respect to this deposition is clear on the record. Out of abundance of caution, knowing it is something that does not often happen, may I make it clear?

Exam. Johnson: You may.

Mr. Clark: The deposition was taken at defendant's instance because we thought the witness might be called away and not be here when the trial came on. Finding when the trial did come on that he was here, we obviously brought him thinking that would be more satisfactory to all concerned, of course including the Commission itself. Having [fol. 247] put him on, I answered you I would not offer his

deposition in evidence. Obviously, unless it is offered in evidence, it is not a part of the record in the case.

Opposing counsel has the privilege of using it in cross-examination, of course. If opposing counsel wishes to use it, it will be complainant's evidence and not defendant's. I wish to make that clear. I was not objecting, if he wished to use it. So I wanted that in. I think that is in keeping with the new District Court rules. It has been a little time since I examined it. I am trying to make my position in keeping with what I understand the rule in the Federal Court would be.

Exam. Johnson: Is that your understanding of it, that he would be made your witness for any information that you are bringing forth at this time? He would be your witness for that.

Mr. Lawson: I understand that.

Exam. Johnson: I hate to exclude that because of the expense to the Complainant and the Defendant in taking this deposition, but I think that is correct and I will give you that privilege of asking him any further information you wish.

Mr. Lawson: That is one reason I wanted it. We paid for it. It cost us considerable money. We might as well use it. I don't want to be in the position that I am impeaching Lieutenant Farrell. I wanted to clear up one or two points, [fol. 248] if I might. I am not sure it is contradictory.

Exam. Johnson: Go ahead and do that.

LIEUTENANT FARRELL, testified as follows:

Recross-examination.

By Mr. Lawson:

Q. In your deposition you were asked in preference to a white passenger would both tables have to be clear, and your answer was, "Not just one." Is that correct?

A. That is correct.

Q. Then the question was, by the complainant, "What I am trying to understand is whether or not if one white person was sitting at a table reserved for colored and got up or another white person came in while that first white person was eating, would you permit him to sit at the reserved table

when you knew there was a colored person already waiting to be served?"

Your answer was: "Would I permit the second white"——

Mr. Clark: I am handing a copy of the deposition to the witness for convenience. I think it really the witness' right to have it so you can follow the question.

Mr. Lawson: Yes.

On page four. These questions are not numbered. It is down near the bottom. What I am trying to understand is whether or not if one person was sitting at a table re- [fol. 249] served for colored and got up or another white person came in while that first white person was eating, would you permit him to sit at the reserved table while you knew there was a colored person already waiting to be served. You answer was, "Would I permit a second white person to be seated at the reserved table, is that correct?"

A. Yes, that is correct.

By Mr. Lawson:

Q. I think that is all, except one question farther over, in other words, about four questions over. "In other words, it is not absolute reservation of the table for colored passengers?" Do you see that?

A. Yes.

Q. Your answer was, "It was not." Is that correct?

A. Yes.

Exam. Johnson: Is there any further question?

Mr. Clark: I have none.

(Witness excused.)

Kenneth Frank McKenzie was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Give your name and your address.

A. Kenneth Frank McKenzie, 1500 Kearney Street, N. W. Washington, D. C.

Q. Have you any connection with the Southern Railway Company?

A. Yes, I have been a steward for the Southern Railroad [fol. 250] for about three years.

Q. Do you know Lieutenant Farrell who preceded you?

A. I took over his position on the car when he left.

Q. Succeeded him?

A. Yes.

Q. On trains 35 out of Washington and the return trains, whatever they may be?

A. Yes.

Q. Do you recall the diner you had when you succeeded him?

A. The diner I had when I succeeded him was 3167.

Q. How many persons would that seat?

A. The seating capacity was 36 people.

Q. What people do you have now?

A. I have 3160.

Q. How many persons does it seat?

A. It seats 48 passengers.

Q. In other words, you have an equal number of four seater tables on each side of the aisle?

A. Yes, converted.

Q. You have converted, increased two-seater tables to four-seater on the right hand side?

A. Yes.

Q. Do you know whether or not your car 3160 was formerly a 36-seater car?

A. It was.

[fol. 251] Q. Do you know what has become or if anything is being done with car 3167?

A. It is being converted to 48 seats, aisle between. All the tables are.

Q. Aside from changing the seating capacity of these cars, are they substantially the same today as they were back in 1942?

A. The seating?

Q. The general layout of the car.

A. The general lay-out is the same except there are 48 seats, 12 seating accom-odations.

Q. I want to ask you if in your experience as a steward, you have noticed any increase in the number of travelers who desire dining car service over recent months within the passengers?

A. A decided increase in diners using the dining car.

Q. Would you say during the past year there has been a substantial increase?

A. During the war.

Q. War activities?

A. That has brought it on more and more.

Q. On this run, have you had occasion to not be able to serve the number of people who came in for meals or at dinner, train 35, before you were cut off at Greensboro?

A. I have on two or three occasions had to cancel checks. [fol. 252] Q. Do you know whether or not there was a provision for serving sandwiches, coffee and the like on the platform at Greensboro and the like for those that may not have been able to be served?

A. The Union News has a concession as far as I know. I do know the Union News serves coffee and sandwiches on the train.

Q. At Greensboro?

A. I think they serve it on the platform at Danville, I am not sure.

Q. They do serve on the train?

A. They do serve on the train, the coach section.

Q. Did you hear Lieutenant Farrell's testimony?

A. I was listening. I sat there.

Q. I take it you heard one of his waiters, John White's testimony?

A. That is right. He is my pantry man.

Q. Not going over that, I do not ask you to adopt it or anything of the kind, you do know about these curtains you heard them testify about?

A. Yes.

Q. Are those curtains still being used on the car you operate?

A. They are.

Q. You succeeded Lieutenant Farrel. Were curtains on the car?

A. They are. With the new car converted, it is the same [fol. 253] formation except eight seats instead of six.

Q. It has the same curtains?

A. The same curtains.

Q. There has been some other change, I believe, made. I want to hand you a little slip here about seven inches long and about two and a half inches wide, with the word in big black letters, "Reserved," on it. I hand you one of those

and ask you if that has any place or connection with the handling of passengers in your diner.

Mr. Lawson: I object, Mr. Commissioner. As I understand it, Mr. McKenzie started to work after Mr. Farrell; we are dealing with the incident on May 17. The fact they have put up this since, does not seem to me to be relevant.

Exam. Johnson: I think it does have a bearing on account of part of your complaint where you are asking——

Mr. Lawson: To cease and desist?

Exam. Johnson: Yes, and to establish for the future for the transportation of complainant and other negro interstate passengers equal and just dining car treatment and facilities.

Mr. Lawson: Yes. While we are asking for better service in the future, I don't think they have a right to show now, subsequent to the subject matter of this complaint, that they have instituted it.

Exam. Johnson: That is part of the complaint, that prayer for the future service.

[fol. 254] Mr. Lawson: Yes. I understand that. My point is that at this point they cannot set up this change. They cannot show it here when the order is issued.

Exam. Johnson: I don't think they have shown that was in effect at the time. It may have been.

Mr. Lawson: They have not shown.

Exam. Johnson: I imagine this would apply to part of the complaint, referring to the future facilities.

Mr. Lawson: Yes. I understand that, but my point is this, since there is no testimony this reservation sign was in effect on May 17.

Exam. Johnson: There has not been.

Mr. Lawson: There is no testimony on that. I think then they are not permitted under the rules to offer it now. Notwithstanding my prayer for future relief.

Exam. Johnson: I will have to rule against you on that.

Mr. Lawson: All right.

Mr. Clark:

Q. You heard, I take it, Mr. Farrell's testimony with respect to what has been called the Jim Crow tables?

A. Yes.

Q. Reserved tables?

A. Yes.

Q. I want to ask you if this sign suggests anything in that connection to you. If so, tell us what it is. I don't want to be charged with leading.

[fol. 255] A. Well, this sign was issued with a letter or bulletin dealing with colored passengers. I don't just know the wording of the bulletin. A while since I actually saw the thing. I haven't got it with me. What it meant anyway was when we made a call, the first call for dinner, we were instructed to place these cards on the table. Draw the curtains and send the waiter up to make the call in the very front of the train, for dinner, and as the passengers came in we seated them in the car. We seated them to the capacity of where those curtains are. And if a colored passenger came, that was his place to sit.

Q. You heard the preceding witness, I take it, say that white persons would come in and sit, seat themselves at stations 1 or 2, the so-called Jim Crow tables?

A. Yes.

Q. As I understand your testimony, you put that on those tables to mark the reserved?

A. That is right, to mark it reserved.

Q. Do you or not take that action when you open the car, say, and call all in for dinner? You announce dinner as being served, do you draw the curtain then and place the call?

A. The curtain has already been drawn and the card is on the table. That is to give me a chance.

Q. Those two tables seating six persons are then seated [fol. 256] aside and reserved for negroes who may desire dining car service.

A. Yes; that is so.

Q. That is what that card is for?

A. That is what was given me with the instructions to that effect.

Q. Do you carry out those instructions?

A. I do.

Q. Do you know whether that is done on runs on other trains where you handle your diner on?

A. As far as the steward's instructions. I can't say they actually carry out the instructions.

Q. The trains you are on?

A. My diner runs on that train. I run the diner on the train it is on. I am not in position to talk about other people.

Q. Do you know whether or not that is a regulation peculiar to you, were the instructions given only to you?

A. It was written instructions, what we call a letter given out on various improvements, necessary enlightenments they want you to carry out on the Southern Railway.

Q. That does not apply to you alone?

A. Written with my name, the agent has half a dozen others with the stewards' names. I get one of them.

Q. Mr. McKenzie, I don't know whether it has ever happened or not, but would it be possible to let us reverse the [fol. 257] thing. I don't know, suppose you had colored passengers who came in in just the reverse order of the number which they come now. Now, we have very few colored. Suppose the great majority would come in for a meal. What would you do with the whites, would you put them behind the curtain and reverse the order?

A. You mean if you had the majority of colored people to what you had white, is that what you mean?

Q. Yes.

A. That would be the reverse around, the seating accommodations according to the number of passengers.

Q. The reverse of that to happen, the colored passengers, have you ever had that to happen?

A. I have never had it to happen. That is the only way I could handle the situation if it came up.

Q. If it came up, you would reverse the order?

A. It is the same thing around. It applies both ways.

Q. On this curtain we speak of, it hangs down when in place from the rod across the car, a little higher than a man's head, right down straight between tables 1 and 3, on one side, and 2 and 4, on the other. Is that correct?

A. That is right.

Q. Is there anything else about that curtain that would mark off or surround the two tables?

A. There is no possibility. I think that has been tried to describe before, just how this curtain was. The curtain [fol. 258] hangs on curtain hooks, on a rod. Sometimes the curtains maybe get hooked up, doesn't get hung up properly; the steward hasn't time to drape curtains when he has 48 people or 36 people to take care of. He does make that attempt to draw the curtain. If the curtain is probably drawn, or half drawn, he has done the technical thing. As far as he knows. He isn't going to stop and unwind rings.

Cross-examination.

By Mr. Lawson:

Q. You say that letter regarding this reservation—what was the date?

A. I can't tell on dates. It was a matter, let me see, I took the car over sometime in June. It was between June and September. Between midsummer and early fall.

Q. So you could not know the date of it?

A. I don't keep actual dates.

Q. Do you have other written instructions? Have you since you have been a steward received any other written instructions than this one?

A. Than this one with the reserved card? No, I have not had written instructions.

Q. Do you mean prior or after?

A. Any time.

Q. The written instructions I understood you to mention.

A. The written instructions, I understood, when I went on the railroad, colored passengers were served after white passengers. Then we had the instructions of colored pas-
[fol. 259] sengers being served beyond the curtain.

Q. Both written?

A. Yes.

This is just more of a clarification. These were given us to let people see when they came in the diner, it was reserved, and they would not go sit down there and I try to haul them off.

Q. When did you get these written instructions regarding service of negro passengers behind the curtain or is that this same letter?

A. As I say, it is not.

Q. The written is not?

A. Not appertaining to the original, which was around the beginning of the war. I just don't know when that was. It was when the curtains was instituted.

Q. With respect to our friend curtain, would you say that curtain drops down closer to table number one or three?

A. Well, that curtain is in between two tables. It is done by the measurements of accountants to put the curtain up, he measures it between two tables in the center.

Q. Center?

A. It draws between the two tables which has the chairs; therefore it runs between the backs of the two chairs.

Q. Have you ever in your experience had this situation where at the small table there were two colored passengers, [fol. 260] at the large table, the Jim Crow table across the aisle, there were four white passengers?

A. Yes.

Q. There is no curtain then separating those people?

A. No curtain is probably drawn, drawn before the meal. I am not going to start undrawing curtains. I have 48 people. That curtain to me doesn't mean anything. If it is drawn, it is drawn. If it is not drawn, it is not drawn. I am not going to start draping it up and hooking it up on a hook.

Q. Have you any complaint from white or colored people about this curtain?

A. I have never had any complaint from either people.

Q. Do you have any oral instructions?

A. I don't go by oral instructions unless my superintendent actually tells me what to do. He doesn't tell me what to do unless he does it in writing. That is a system they go under. That is the only thing I have to go for in those letters. I keep those in a book to refer to.

Q. That isn't quite responsible. Have you ever had any oral instructions from the superior?

A. Appertaining to what?

Q. To the running and operation of the diner in general or in respect to negro diners, passengers.

A. I have had no oral explanation at all. I have a letter. I carry that out to the best of my ability.

[fol. 261] Q. That is what I wanted to know.

A. Yes.

Mr. Lawson: I think that is all.

Exam. Johnson: Have there been times, Mr. McKenzie, when white persons have been served behind the curtains, that is when the curtains are in place?

The Witness: The idea is to fill the capacity of the car with white passengers up to those curtains. If there are no colored passengers that present themselves, you can't see anyone anywhere, you just draw the curtains, go ahead and fill the car up.

Exam. Johnson: I was thinking those were pulled before the car is opened.

The Witness: That is right, before the car is opened.

Exam. Johnson: If white people should later occupy those seats, are the curtains just left in place?

The Witness: They are probably left in place. It just depends on how the situation was. If I was what we term up a tree, I don't know that I would take the trouble to draw them all the way back. I would probably switch them. If they went back, it was all right. If they didn't, they stayed there.

Exam. Johnson: Is there any other question on direct?

Redirect examination.

By Mr. Clark:

Q. You have been asked about the written instructions. [fol. 262] I hand you a paper and ask you to read that and see if it refreshes your recollection.

A. That is right. As I say, if I was pushing curtains back——

Mr. Clark: I haven't copies. I will be glad for him to read it in the record.

Mr. Lawson: I want to see if the paper is worth reading.

(Counsel examines paper.)

Very well. This is Joint Circular No. 61.

The Witness: "August 6, 1942.

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken, then, if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

" 'Reserved' cards are being supplied you."

[fol. 263] Recross-examination.

By Mr. Lawson:

Q. Mr. McKenzie, in view of this instruction regarding thie advice to negro patrons, that they would be served as soon as compartments were vacant. What would you do if the diner was full, I mean if the Jim Crow seats were full of white people and colored passengers came in? What would you say or do?

A. I would explain to the colored passenger as soon as the white passenger got out, as soon as the first table at least got cleared, we would give them seating accommodations in that part that is reserved for colored passengers.

Q. Assume there was one vacant seat in the body of the car. All other seats were taken, Jim Crow seats, and all, would you under any circumstances, assume one fact further, that the train as in this case was nearing the point where the diner would be taken off, would you serve that colored person in a seat in the body of the car?

A. I would not. I would give that colored person the privilege of being served in the Pullman car, in the section or seat, whatever it was, on the train; according to, as far as I know, the state laws either of Virginia or North Carolina, you would have to do that.

Q. Of course, you know nothing about the subject matter of this complaint in this Henderson case?

A. No.

[fol. 264] Mr. Clark: Would you like a copy of this "Reserved" thing for the record? I have described it.

Exam. Johnson: I don't think it is necessary.

No further questions. You may be excused.

(Witness excused.)

R. K. McClain was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. You have just been sworn?

A. Yes.

Q. Give your name, say where you live, what city.

A. R. K. McClain, Washington, D. C.

Q. What position or office do you hold with the Southern Railway Company?

A. Assistant Vice-president in charge of transportation and operation.

Q. That is also of the other lines which go to make up the Southern Railway System?

A. All the Southern Railway System.

Mr. Clark: Mr. Examiner, the Southern Railway System Lines are those so held to be by the Commission in the Southeastern Livestock Case, 101 ICC reports. I forget the page. It has been up several times.

By Mr. Clark:

Q. Transportation is under your jurisdiction?

[fol. 265] A. Yes.

Q. The Rule Book for the government of employees is issued, I take it, by the operating department. Have you any connection with those rules?

A. The Rule Book is signed by the Operating Vice-President. I come next to see if they are enforced.

Q. You are the man that actually deals with them?

A. Yes.

Q. Have you had occasion to consider the question of dining cars and the serving of white passengers and colored passengers in the diners? Has that been a subject that has been considered by you?

A. It has.

Q. I have before me a paper marked Southern Railway System, dated July 3, 1941. It is in two sections. One section deals with Pullman cars, which is not here involved. Section two deals with dining cars. I would like to exhibit this to the Examiner and let him see that the Pullman part is of no moment. That is the reason I am not putting it in as an exhibit, because I can't well separate it. There is a short rule there with respect to dining cars which I want to ask Mr. McClain to please read into the record. Will you read section 2.

A. "Section 2. Dining Cars. Meals should be served to passengers of different races at separate times. If passen-

[fol. 266] gers of one race desire meals served while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car

is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

Q. How long have you been Assistant Vice-President?

A. Approximately five years.

Q. Prior to that time had you been connected with the Southern Railway and System Lines?

A. Since 1900.

Q. During that period has your activities been in the operating department?

A. Altogether.

Q. In the operating department, that particular branch known as transportation?

A. Yes.

Q. As distinguished from shop work, things of that kind?

A. Yes.

Q. It is the running of trains, of handling of passengers and freight that is your particular duty?

A. That is it, sir.

Q. Have you had occasion, I believe you said you had occasion to consider this question of feeding the races in the diner?

[fol. 267] A. Yes.

Q. Can you give us in your own way something to show us the background or why it was necessary to put out such a rule as this? What is the motive back of it? What were you aiming at?

A. For a long period of time the rule was that the different races would be served at different times, but in 1941, starting through that period, there was an increase of traffic. On a good many of the diners the breakfast meals would run into the noon meals. The noon meal would run into the dinner meal. There wasn't any time but what there was some race in the dining car at all times. That made it——

Q. No chance, I take it you mean to wait until everybody cleared out to serve the colored passengers?

A. That is right.

Q. That brought on the change?

A. That brought on the change. It was found necessary to work out some plan whereby both races could be accom-odated at the same time.

Q. Then came on your curtain arrangement?

A. Then came the partition, arranging it with the curtain.

Q. More recently putting the reserved tags?

A. That followed so the Jim Crow end would be vacant until every other seat was taken in the dining car.

Q. That was one more step?

[fol. 268] A. One more step.

Q. The next step was to make the 36 to 48?

A. The 36 were increased to 48 seats.

Q. It was done over the System?

A. It was done over the System, practically all the diners now are 48 seats. All of them were increased. They are practically on that program now.

Q. Has there been within the past year or eighteen months any appreciable increase or decrease with respect to travel on your roads?

A. There has been quite an increase.

Q. Could you give us briefly some causes and reasons for that, how it happens?

A. It is principally due to the movement of the armed forces and other civilian travel, traveling on defense business.

Q. When you speak of armed forces, do you take the men in uniform, which we call troops, as well as selectees, inductees and the like?

A. I take all into consideration, furloughed men as well.

Q. Lets get back to the question of the initial rule you had. Your first idea was you would serve colored passengers who were in the minority according to this evidence. You would serve them after the whites had been served?

A. Either ahead or afterwards.

Q. But at different times?

[fol. 269] A. Different times.

Q. That was your first step, then you have made these other steps you have explained?

A. Yes.

Q. Go back to the broad question, why was it necessary to make this seeming segregation of the races?

A. Due to the temperamental people of the South, we did that to keep down friction.

Q. The Southern Railway operates through states we know from Washington South, Virginia, let us run down, Virginia, what comes next, North Carolina?

A. North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana.

Q. Those are the Southern states?

A. Yes.

Q. Of course we have some border states, Tennessee and Kentucky?

A. Oh, yes.

Q. Those are the states served by the Southern Railway?

A. Yes.

Q. Are you familiar with the people that live in those states in that territory?

A. Yes, I was raised in that territory.

Q. You told me, due to the temperament, is that just the [fol. 270] temperament, or is it the feeling and attitude of the people? What do you have in mind?

A. That is the feeling and attitude of the people. For example, I might express it this way. That is both races. If a certain compartment is set aside in coaches for the colored travel, certain for the white travel, the colored travel resents any white travel coming into their compartments. They even object to the white trainman having a seat in their compartment. The conductor and flagman or baggage master. Likewise, the white race, they object to the colored race coming into their compartments.

Q. You say, then is the separation based on an idea of keeping peace and order on your trains?

A. Absolutely.

Q. The conductor of your train is under your general rules operating the road, is he the one in general charge of the train?

A. He is in general charge of the train and his duties are to see that order is maintained.

Q. Based on your experience in operating railroads in this section of the country, would the seating of white and colored passengers together by the steward tend to create peace and harmony or would it likely create confusion and discord and irritating situations?

A. It would create discord, probably end in a race riot [fol. 271] before it was over.

Q. Have we in the south unfortunately experienced difficulties along those lines in the operating of our road with our passengers?

A. In a good many cases.

Q. Do you recall they have actually gone to the point of suing the company in cases of that kind?

A. Several cases where they have actually entered suit.

Mr. Lawson: May I ask who entered suit against whom?

Mr. Clark: I was going to ask that.

By Mr. Clark:

Q. What kind has it been, a white person suing the railroad or a colored person suing the railroad, for injury or what?

A. Practically all colored passengers, I recall now.

Q. Colored passengers, mistreated sue the railroad for damages?

A. That is what I alluded to, yes.

Q. It is a matter of keeping down friction.

A. Keeping down friction by providing separate compartments for the different races.

Q. In your testimony, now, this particular incident here happened on train 35, on the Washington Division, between Washington and Greensboro. I want to ask if your testimony is confined to that Division or part of the road or does it go over the road throughout the Southern territory?

[fol. 272] A. It goes over the whole Southern territory.

Q. The rules you have described, the reasons therefor, are not confined to this one train or these states?

A. The System as a whole, all Southern Railway trains south of the Ohio River, and South of the Potomac River.

Q. Do you have to operate in the light of Jim Crow laws?

A. Yes, in all states south of those rivers, the Ohio and Potomac River.

Q. That is all I was interested in proving, was the fact of the existence of such laws.

A. Yes.

Mr. Clark: I think it is pretty well recognized that they are there. I have conveniently at hand the Code citations, and sections, too, each one of them. If you will like, I will read them in or I will file an exhibit or write a letter later with a copy to counsel giving those citations and sections.

Exam. Johnson: We would like to have that, Mr. Clark, if you would later file it as an exhibit.

Mr. Clark: Then the Code will be available.

Mr. Lawson: Yes.

Mr. Clark: It is a good deal of trouble to copy them at length. Is that satisfactory?

Mr. Lawson: Yes.

Exam. Johnson: All right, that will be filed as an exhibit, within ten days. I won't give that a number until it comes in.

[fol. 273] Mr. Clark:

Q. This rule you read in, the general instructions rather that you read into the record, is that still in effect?

A. It is.

Q. That is a general rule, it is modified in minor particulars, I take it, as the occasion might demand from time to time, but that is the general basic rule?

A. General basic rule is right.

Mr. Clark: You may cross-examine.

Cross-examination.

By Mr. Lawson:

Q. Is it fair to assume your testimony is this, the rule and policy of the company is based on your desire to keep peace and good order among the races?

A. Absolutely.

Q. That is what I thought I understood. You say the reason back of that, farther, is based partially in your own experience because of the temperament and feeling of the races?

A. Yes.

Q. What are the feelings and temperament of the races predicated upon?

A. On the action when they do go into compartments not assigned to them. For example, we have had more complaints from the colored race than we have from the white race about white people coming into their compartments.

Q. Do you think that is fair, in view of the segregation? [fol. 274] Have you had any trouble as result of that colored people feeling they are kept from the white side it is only fair that the white people should be kept from their side?

A. That is fair. That is what we try to do is to keep peace and harmony, keep order on the train.

Q. Would you say that these feelings and temperaments are based on a sense of inferiority by one race or the other?

A. Probably so.

Q. One other question, I understood you to say the traffic increased around the beginning of 1941?

A. That is right.

Q. Why was the traffic increased at that time, if you know?

A. Due principally to preparation of defense projects such as that.

Q. Are you familiar with the Mitchell case?

A. Not generally, no.

Mr. Clark: I hardly think that is a proper question for a transportation man, a decision of the Supreme Court of the United States.

Mr. Lawson: That isn't proper. Strike that.

By Mr. Lawson:

Q. Has there been, Mr. McClain, an increasing number of lawsuits by colored people involving dining car facilities in recent years?

A. Yes.

Q. Do you know the reason for that?

[fol. 275] A. Yes.

Q. Will you tell us?

A. It is principally due to the fact that the colored travel have insisted on going into the white compartment of the cars which is a violation of the Jim Crow laws.

Q. So that negroes have insisted in recent years on being served in the diner?

A. Being served in the diner. We have made arrangements to take care of that. Heretofore, there has always been sufficient time in the dining cars to serve both races at different periods.

Q. Did your company recognize the impracticability and unfairness of that old rule?

A. The old rule at that time was all right. It adequately took care of the situation. Then when conditions changed, we made different arrangements.

Q. With the old rule, they must be served separately. The new rule sets aside or undertakes to set aside these reserved seats or the Jim Crow seats. Is it a fact that when the diner is filled to capacity and colored people, there are no Jim Crow seats for colored people, no other provision is made for them other than offering to serve them in their space?

A. In their space. That is as to both races. We would

serve white passengers the same way, if they would come to the dining car and it is full. We will serve them at their seats.

[fol. 276] Q. If a colored person comes, the Jim Crow seats are full, you offer to serve them?

A. Serve them at their seats unless they desire to wait until there is room at the tables assigned to the colored race.

Q. Has your company taken into consideration that this reserved section imposes additional expense on colored passengers?

A. No.

Q. It has not?

A. No.

Q. Is there any difference in the practical application of the old rule and the new rule when the diner is full of white people? I mean by that, that under the old rule negroes could not eat if they were hungry until after the white people, or before.

A. Either before or after.

Q. In other words, they couldn't eat until they wanted to?

A. No, they had to take either one of those assignments.

Q. Under the new rule, they can't eat if the car is full with white people?

A. White or colored people, either. If the Jim Crow is full of colored people, they have to stand and wait just like the white people.

Q. There is no problem there, under the new rule negroes [fol. 277] can't eat when and where they want to if the Jim Crow seats are full of white people?

A. That same thing would apply to this. If the car, we have a good many troops to feed. We feed them before we feed the regular travel. If the dining car is full of colored troops, the white race waits until they all clear out before they can get a seat to eat.

Q. Why the discrimination between soldiers and civilians?

A. We give soldiers preference on everything, in loading trains, seats, every way. There is only one seat and a soldier, we feel the soldier should have the preference. Practically all the citizens in the country agree to that. We have had no complaints as to that.

Q. We certainly have none.

Does that apply to colored soldiers, too?

A. Yes.

Redirect examination.

By Mr. Clark:

Q. The reference to soldiers prompts me to ask one question on redirect. Mr. McClain, you have, you say fifty soldiers to feed. The Sergeant in charge can bring 48 of them in and seat them right down?

A. Yes.

Q. While they are eating, neither white nor colored could be served, no matter how hungry they were?

[fol. 278] A. Now matter how hungry they were, the white people are treated the same as the colored race in the compartments assigned to them. If colored troops come in, we have a good many special movements of colored travel going back and forth, we confer with them, see when they want their meals, se- aside the hour they shall eat. While they are in the dining car, maybe 20, 30, 40 or 50 of them, then the white race cannot go in the dining car until all the colored race have finished and gone.

Q. Each month you fix up a statement as I recall of the number of extra cars operated on regular trains for the handling of troops.

A. Yes.

Q. My recollection is that it runs anywhere from——

A. Twelve to seventeen hundred, eighteen hundred.

Q. On all the trains on the System?

A. Yes.

Q. That means you have a carload or two carloads of troops on a regular train. Now you have got to feed those troops in the diner?

A. Yes.

Q. I want to ask you, to get you to elaborate and let me see if I understand you. You go to the sergeant and have those men come in in bodies.

A. Yes.

[fol. 279] Q. You try to feed them early or late?

A. Yes.

Q. Especially to themselves?

A. Yes.

Q. So that runs them in, you serve one carload of them, out they go, you bring in another?

A. The overflow. If there is not enough for the second, we bring the overflow in, feed those first. We have many cases like that.

Q. That is done irrespective of white or colored soldiers?

A. Yes. We have a good many troops that come into Birmingham early in the morning, going to Anniston, Alabama, only a short run from Birmingham to Anniston. We feed both colored and white troops in preference to civilian travel. We won't open the dining car unless the fact is known the civilian travel can be out of the way before the soldiers, either colored or white, come to eat.

Q. I want to ask you, isn't it a fact your steward will go back and take your army crowd, your troops, bring them in and feed them, get them started before you ever announce the diner is open to civilian travel?

A. Yes.

Q. That is an incident of war?

A. Yes, all of them, before they make any announcement of meals being served.

[fol. 280] Q. That might occupy every seat in your car?

A. Absolutely.

Mr. Lawson: That is all.

(Witness excused.)

J. M. PLASKITT was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Give your name and residence, please.

A. J. M. Plaskitt, Belhaven, Alexandria, Virginia.

Q. Are you connected with the Southern Railway System Lines?

A. Yes.

Q. That is the Company and System Lines just like Mr. McClain mentioned?

A. Yes, sir.

Q. How long have you been connected with the Southern Railway?

A. In my present position?

Q. First, in your present position, then as a whole, both.

A. Five years in my present position, since 1924, with the Railroad Company, on the System.

Q. Your present position is what?

A. Mechanical engineer.

Q. Is that a branch of the operating departments?

A. Yes, sir.

Q. That is the mechanical branch as distinguished from the transportation branch that Mr. McClain explained?

[fol. 281] A. Yes.

Q. It deals with the equipment?

A. We have charge of the acquisition, design and specifications for new locomotives and cars and the maintenance of all the rolling stock.

Q. Really, the rolling stock is your particular branch of the business?

A. Yes.

Q. We have testimony here about two diners, one 3167, another 3160. Those cars were originally 36 seat cars. The presently used car, 3160, Mr. McKenzie states now seats 48. He understood the 3167 was being also converted to a 48-seater. I want to ask you whether that is a general step on the part of the railroad or just confined to two or three cars?

A. I think it has been a general step that most of them have been coverted to.

Q. In other words, that is enlarging your capacity and facility for handling diners?

A. Yes, it involved the use of a double row of tables on one side of the car with a row of single tables on the other side. That single table side, we are making double tables.

Q. That adds materially to the capacity of the car?

A. It increases it to 48.

Q. Under present conditions, perhaps obtained for some little time, has there been any difficulty in acquiring new equipment such as dining cars, if so, when?

[fol. 282] A. Since sometimes before the war started it has been impossible to get passenger equipment.

Q. Has there been any restriction, as we say, has the present equipment become frozen? How would you express it?

A. I would say it has become frozen.

Q. Mr. McClain says the passenger traffic has increased. Obviously the diner use has increased. Have you been able to get additional diners?

A. No, sir.

Q. So you are enlarging them as best you can to tide over and handle the public?

A. That is right.

Mr. Clark: Cross-examination.

Cross-examination.

By Mr. Lawson:

Q. In the corporation's attempt to acquire new rolling stock, has any information come to your attention as a reason for that, except the natural increases resulting from the war?

A. You mean the increase in passenger business?

Q. I guess I did not make myself clear. You have tried to get new rolling stock and couldn't because of the war conditions. It is frozen, and so forth.

A. That is right.

Q. Is there any other reason for the acquisition of new facilities, passenger facilities other than war conditions [fol. 283] that you can think of?

A. The necessity for additional equipment, of additional passenger equipment is governed entirely by the increase in passenger travel, whether it be from troops, army, navy marine corps or civilian travel. As to the length of time that may last, what will come after the war, I wouldn't be in position to predict.

Q. Has any information come to you along with the natural increases resulting from the war that there has been an increase in the negro passenger traffic?

A. I would say that I don't have any statistics right at hand as to the exact answer to that question. But I firmly believe that the colored travel has increased proportionately to the general increase throughout the country, probably.

Q. That is notwithstanding the war, or aside from the war, in the general evolution of things, as negroes get more jobs, more money, they naturally, like other people, try to travel in better facilities. If that is a fact, do you have any information indicating that negro passengers are increasing aside from the natural increase during the war?

A. I haven't any statistics that would enable me to answer that question.

Q. Aside from the statistical data, what is your impression?

A. Well, with the increase in negro employment throughout the nation as well as the white, or any other race, the impact of that, I think, is bound to be felt in the passenger train operation, especially with the curtailment of other [fol. 284] modes of travel.

Mr. Lawson: Thank you very much.

(Witness excused.)

J. D. SMITH was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Give your full name.

A. J. D. Smith.

Q. Where do you live?

A. 511 Second Street, Spencer, North Carolina.

Q. What connection, if any, have you with the Southern Railway Company?

A. I am a Southern Railway conductor.

Q. You run passenger or freight trains?

A. I am running passenger.

Q. How long have you been passenger conductor?

A. Practically six years.

Q. How long have you been in train service of the Southern Railway Company?

A. Braking and running as freight conductor since 1905.

Q. You have been conductor years, I take it, before you got a passenger run?

A. Since 1912.

Q. Back in May, particularly, May 17, 1942, were you serving as conductor on the road?

A. Yes.

Q. What train were you operating at that time out of Washington?

A. Train 35.

[fol. 285] Q. What time did that formerly leave Washington?

A. Schedule 2:00 o'clock P. M.

Q. Daily?

A. Daily, yes.

Q. What time would you arrive at Greensboro, North Carolina?

A. Around 8:55 to nine o'clock.

Q. I take it then, your run went on to Salisbury, where you were relieved?

A. Yes.

Q. Mr. Smith, the occurrence involved in this litigation is alleged to have occurred on May 17, 1942. You say you are the conductor on that?

A. Yes.

Q. Will you please tell us the consist of that train of that date?

A. Well, I would——

Q. Have you your book?

A. Yes.

Q. Refreshing your recollection, give the numbers of the car.

A. May was the fifth month. Beginning with head end, 656 that was a combination car, part of it baggage, the other end was passenger carrying car.

Q. Next one.

A. 1489, straight plain coach. Next one was 1200, that was a passenger carrying car. The next 1000, that was a passenger carrying car. 1677 was a passenger carrying car. 1792 was a passenger carrying car. 1459 was a passenger carrying car. 1367 was the diner. And car No. 57, Litch-
[fol. 286] field, that was the Birmingham sleeper, Pullman car. S-24, McBayne, that was a Pullman, New Orleans, sleeper.

Q. So you had a combine of six coaches, a diner, and two Pullmans, is that right?

A. Yes, that is correct.

Q. Was that consist more or less than you formerly operated on 35?

A. Well, it was more.

Q. How much more?

A. By three cars.

Q. You mean three coaches or what?

A. Three coaches.

Q. Three extra coaches?

A. Yes.

Q. I believe that was on Sunday?

A. It was, yes.

Q. Does the week-end and Sunday have any effect on the travel?

A. It does.

Q. You did have three extra coaches?

A. Yes.

Q. Leaving Washington, could you tell me, the best you can, the number of passengers you had?

A. Well, I would say, week-ends, from experience, I had approximately three hundred passengers.

Q. On ariving at Greensboro, what would the number be?

[fol. 287] A. Well——

Q. More or less?

A. More.

Q. Likely to be more?

A. Yes.

Q. Wouldn't be less?

A. Wouldn't be less.

Q. Do you recall your scheduled time at Danville, Virginia?

A. On that date, it was 7:38 arriving.

Q. Of course, if you were late, you would be still later than that?

A. Yes.

Q. Did you leave Washington on time that day, the 17th of May?

A. Left at 2:06.

Q. Six minutes late.

A. Yes.

Q. Do you recall the arriving time at Greensboro?

A. Around nine o'clock.

Q. I want to ask you if you are governed in the operating of trains by the rules familiarly known as the rule book you heard Mr. McClain mention? Do you have rules for the government of your train?

A. Yes.

Q. I am going to hand you a paper which I will mark Exhibit No. 1 for identification and ask you whether that paper contains excerpts from the rules governing you in [fol. 288] tne handling of your train and the passengers

thereon in effect at that time? Would you like to check it against the rule book or do you recognize it.

A. Yes, I recognize these rules very clearly.

(Exhibit No. 1, Witness Smith, marked for identification.)

Q. Would you say that that paper represents a true and correct copy of the rules 1136, 1138, 1191, 1196, 1200, and 1201?

A. Yes.

Q. Of the several members of the crew, who is in charge?

A. The conductor, the train conductor.

Q. The crew is made up of the engineer, fireman, baggage master, brakeman, conductor, anybody else?

A. That is all the members of the train crew.

Q. You are in charge?

A. Yes.

Q. When you have a dining car on your train, it is in the immediate charge of the steward you heard testify?

A. Yes.

Q. Is the dining car part of your train and subject to your jurisdiction and general control.

A. Yes, my general control.

Q. If there should be any confusion on the train, the Pullman conductor, the flagman, or the dining car steward wouldn't attempt to eject a passenger but would call on you?

A. He would call on me.

[fol. 289] Q. You are the peace officer on the train, in that the short answer to it?

A. Yes.

Q. Do you know whether or not on this particular day of May 17, you received any complaint about any occurrence in the diner, in the Pullman cars, between any passenger or any member of your crew?

A. No, sir, I did not.

Q. No trouble of any kind?

A. It wasn't called to my attention at all.

Q. At Greensboro, North Carolina, do you know whether or not there is any provision for any agency to come upon your train or your platform with the view of serving lunches, coffee, or what?

A. I do notice a boy coming up with sandwiches and coffee at night.

Q. You have seen him there.
A. Yes.

Mr. Clark: If the Examiner please, we offer Exhibit No. 1.
Exam. Johnson: Exhibit No. 1 is received in evidence.

(Exhibit No. 1, Witness Smith, received in evidence.)

Mr. Clark: You may cross-examine.

Cross-examination.

By Mr. Lawson:

Q. Mr. Smith, this Exhibit No. 1 is not generally published so that passengers would know about it, is it? They are instructions from the company to you?
[fol. 290] A. In our book of rules.
Q. So the public wouldn't know you were the peace officer, would it?
A. I couldn't say.
Q. So far as you know, there is no way——

Mr. Clark: I will gladly answer that if the Examiner will permit me. In furnishing the information with respect to the so-called "Jim Crow" laws, I shall also give reference to the State statute giving the conductors police powers to maintain peace. The conductor doesn't know the laws. The law is back of his rules.

Mr. Lawson: I wanted to see if he knew that, see if as far as he knew a particular passenger knew anything about those rules.

By Mr. Lawson:

Q. Those rules are not published in the car or any place, are they?
A. No.
Q. Mr. Smith, was your train on time on the 17th, do you remember?
A. As well as I can recollect, it was.
Q. Could you tell me if it were on time, what state and city your train would be in at 7:45?
A. At 7:45, it should be at Danville, Virginia.
Q. So if the allegations which are the subject of this litigation occurred at all, they occurred within the State of Virginia?
[fol. 291] A. It did, if it occurred at 7:45.

Q. Any time prior thereto would be in the State of Virginia?

A. Yes.

Q. On this date, May 17, 1942, how many passengers would you estimate were above the average, how many approximately, how many more did you carry on this trip than you do ordinarily?

A. Well, ordinarily, first of the week, at that day and time, it has increased considerably since that time, I would say we would carry approximately a hundred or more.

Q. So that on this date you had about a hundred more than normal?

A. Probably more.

Q. Yet you only had one diner?

A. One diner.

Q. Do you recall seeing Mr. Henderson that day?

A. No, I don't recall.

Q. Talking about that trip on your train on May 17, was there a correspondingly increased number of Negroes? Was the train preponderantly white or colored, in proportion, I mean to the population.

A. I would say it was quite any number more of the whites than there were colored.

Q. That is true generally, I suppose, all the time because of the population?

A. Yes, it is.

[fol. 292] Q. Was there an unusual number of Negroes on the tr-in that day, unusual number of whites, or both?

A. Due to the week end, it was heavy.

Q. Heavy, both were?

A. Heavy, that way.

Q. Were there a few more Negroes than usual as well as white?

A. No, just about the average Sunday travel.

Q. For both races?

A. For both races.

Q. On this night, this day, did you see anybody selling sandwiches or coming on the train?

A. I couldn't recall that.

Q. You didn't see it that night? At Danville or any other place, do these people come on selling sandwiches or fruit?

A. They are regularly at both places but I don't recall seeing them.

Mr. Lawson: I think that is all.

Exam. Johnson: If there is nothing more, the witness is excused.

(Witness excused.)

Mr. Clark: The defendant rests.

Exam. Johnson: Have you anything on rebuttal?

Mr. Lawson: I don't think so. No, I haven't.

I would like to clear up one or two points. Is this deposition in or out?

Exam. Johnson: That is out.

[fol. 293] Mr. Lawson: I wanted to make it clear. There was a little confusion about it.

Is it in order for me to ask now, Mr. Examiner, for an extension of time on this brief for the reason that I have a couple of other matters in the Court of Appeals. It would save my time and theirs writing and getting an extension. Could we agree now?

Mr. Clark: There is no objection from our side. We would like to indulge counsel.

Mr. Lawson: I do have a few matters in the Court of Appeals, if we could have a ten-day extension, Mr. Examiner.

Exam. Johnson: I will give you until April 5th.

Mr. Lawson: Yes, I appreciate that.

Exam. Johnson: No free copy of the record. Is there anything further?

Mr. Lawson: No, I think I am all clear.

Exam. Johnson: All right. The hearing is closed and briefs due April 5th.

(Whereupon, at 3:35 P. M., February 25, 1943, the hearing in the above-entitled matter was closed.)

[fol. 294] INTERSTATE COMMERCE COMMISSION

No. 28895

ELMER W. HENDERSON *v.* SOUTHERN RAILWAY COMPANY

Submitted October 14, 1943. Decided May 13, 1944

Failure of defendant to furnish dinner service to complainant, a member of the Negro race, in its dining car in connection with a journey made by complainant on May 17, 1942, from Washington, D. C., to Atlanta, Ga., found to have subjected complainant to undue and unreasonable prejudice and disadvantage. Further found that no basis is shown for an award of reparation and that no order for the future is necessary. Complaint dismissed.

Belford V. Lawson, Jr., and *Marjorie McKenzie* for complainant.

Charles Clark and *A. J. Dixon* for defendant.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS AITCHISON, MAHAFFIE, AND ALLDREDGE

BY DIVISION 2:

Exceptions to the examiner's proposed report were filed by the complainant, and the issues were argued orally. Our conclusions differ somewhat from those recommended by the examiner.

Complainant, a Negro, is a citizen of the United States, and an employee of the Federal Government. By complaint filed October 10, 1942, as amended at the hearing, he alleges that on May 17, 1942, while he was traveling as a first-class passenger over defendant's line from Washington, D. C., to Atlanta, Ga., defendant "practiced undue and unreasonable preference and disadvantage against the complainant and subjected him to undue and unreasonable prejudice and disadvantage by (1) refusing to serve him, (2) providing unequal, insufficient tables and dining car service in the dining car, (3) by the impractical, humilitating, discriminating, and unfair use of a curtain around the tables allegedly reserved for Negroes, and (4) by giving unlawful, discriminatory, and unnecessary preference and advantage to certain white persons * * * in respect to transportation, and

facilities, in that it failed and refused to serve complainant at tables in the dining car where there were empty seats, which tables and seats were reserved for Negroes, but were allowed to be used by white persons," in violation of section 3 of the Interstate Commerce Act. We are asked to require defendant "to cease and desist from the aforesaid violations of said Act and in the future to establish, apply and enforce [fol. 295] for the transportation of complainant and other Negro interstate passengers equal and just dining-car facilities and such other services and facilities as the Commission may consider reasonable and just; * * * to remove and discontinue the impractical and unequal and humiliating practice of using curtains around the tables reserved for Negroes;" and to pay to complainant "reasonable and just damages * * * for the aforesaid violations."

In his brief of complainant states that—

> The specific conduct of which complaint is made and upon which this litigation rests is the defendant's refusal and failure to seat the complainant at a vacant seat at tables allegedly reserved for colored passengers at a time when those tables were partially occupied by white passengers and at a time when the complainant sought service; and the refusal of the defendant to notify the complainant when he could be served, as promised, before the diner was taken off at Greensboro, N. C., with the result that the complainant was never served.

On May 17, 1942, complainant left Washington at approximately 2 p. m. aboard defendant's train No. 35 bound for Atlanta, Ga., traveling as a first-class pullman passenger. The train consisted of 1 combination baggage-passenger car, 6 coaches, 2 pullman cars, and 1 dining car with seats for 36 persons. It carried approximately 300 passengers, about 100 more than the usual number, necessitating the use of 3 extra coaches. The pullman cars were in the rear of the dining car, making it necessary for pullman passengers who desired dining-car service to enter the diner through an aisle alongside the kitchen. From the kitchen end, the tables on the left side of the diner accommodated 4 persons and those on the right side, 2 persons. The car was equipped with curtains which, when drawn, separate the 2 tables nearest the kitchen, hereinafter referred to as the end tables, from the other tables. When drawn, the curtains extend from the

sides of the car to, but not across, the center aisle; they do not extend along the aisle side of either end table.

For many years, it was defendant's practice to serve meals to passengers of different races at different times. Negro passengers, being in the minority, were served either before or after the white passengers had eaten. The increase in passenger traffic in 1941, due to defense activities, made necessary some plan whereby both races could be accommodated at the same time. It was found that the length of time required for serving white passengers would extend into the time for the next meal, leaving no time in which to serve Negro passengers. The installation of curtains was designed to correct that situation. Since the time of complainant's journey, defendant's dining cars have been equipped with 4-seat tables on both sides, thereby increasing to 48 the capacity of the car, and to 8 the number of seats at the end tables.

[fol. 296] In July 1941, defendant issued to its passenger department employees a circular of instructions concerning accommodations for passengers of different races, one section of which reads:

Dining Car Regulations

Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them.

On August 6, 1942, these instructions were supplemented as follows:

Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain

should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you.

Since the curtains were installed, Negro passengers have been served as they presented themselves in the diner, except under unusual circumstances such as prevailed, as described later herein, when complainant failed to obtain dining-car service.

As passengers enter the dining car when it is opened for meal service, it is defendant's practice to seat some of them at each waiter's "station," or group of tables, so that all the waiters may be engaged promptly and service expedited. If any Negro passengers are present, they are seated and served at the end tables. Relatively few Negro passengers us the dining car, and for that reason the end tables are not absolutely reserved for their exclusive use; but white persons are not seated at them until the other tables are filled. Then, if no Negro passengers present themselves, the end tables are used for white passengers. If a Negro passenger requests service when both end tables are fully or partially occupied by white patrons, the practice is to offer him service in his pullman space or at his coach seat, using a portable table, without the extra charge usually made for that service. When so served, the passenger receives the same food and waiter service that is furnished dining-car patrons, and the dishes, silverware, and linens are those used in the dining car. Negro civilians are served in the dining car simultaneously with white passengers only at the end tables. White and Negro soldiers are served together, without distinction.

[fol. 297] In view of the conflicting testimony of complainant and witnesses for defendant, as to the circumstances and conditions under which the defendant failed to furnish the complainant dining-car service, an abstract of that testimony is here set forth.

Testimony of complainant.—I went into the diner at about 5:25 p. m., soon after the call for dinner. I found probably one-third to one-half of the tables occupied. No

other passengers were waiting to be seated. I requested service and was informed by the steward that I could not be served, as neither of the end tables was vacant. As I observed, there was one person at the two-seat end table and two at the four-seat end table, leaving three empty seats at the two tables. There were empty seats throughout the car. The steward suggested that I return to the pullman, and said he would call me. I waited about 15 mintues, then retired. I returned to the diner at about 7 p. m. and found the car crowded but, as I recollect, there were empty seats at some tables. I again asked the steward for service. He said the laws of the State through which we were passing (Virginia) prevented him from serving me at that time. He suggested service in the pullman. I refused because I felt that under the law I had a perfect right to eat in the dining car if seats were available. The steward then said he could serve me only when and if one of the tables behind the curtains became vacant. One white person sat down at an end table while I was there. I left, but went back a third time about a half hour later. The steward then stated that he would call me in a short while, but did not do so. The diner was taken off the train at Greensboro at about 9 p. m., and I was not served. There were vacant seats at the end tables the first two times I was in the diner; I do not remember about the third time. Neither end table was entirely vacant while I was in the dining car. The steward was courteous; there was no confusion; our conversation attracted no attention. I was hungry, inconvenienced, humiliated before servants, my feelings were hurt, and I was somewhat ill the next morning.

Testimony of witness Farrell, an officer in the Army Air Forces, formerly for 6 years a dining-car steward in the employ of defendant.—I was in charge of the dining car on train No. 35 on May 17, 1942. The day was Sunday, and the train was crowded. When the doors were opened for dinner at about 5:30 p. m., many passengers were waiting. The car filled promptly, still leaving a line. I first saw complainant coming around the line; he made himself conspicuous by passing the line. I was standing at the head of the narrow aisle opposite the kitchen, my customary position when the car is filled. To my best knowledge every seat was taken at that particular time; they (the passengers in line) would not have been standing there if there were

any vacant seats. I told complainant he was not first; that [fol. 298] other people had been waiting longer than he had. I suggested that I could give him better and quicker service in his pullman space. I told him that he could see the crowded conditions, and asked him to help me, to cooperate with me, to let me serve him in his space. I could not serve him any other way. He refused and, after a few minutes, left the car. About an hour later, he came back. I told him conditions in the diner were unchanged and instructed a waiter to take his order and serve him in the pullman. When he refused again, I explained that I could only seat him at one of the end tables when it was available, and that I would have to draw the curtains. He said "he would not be embarrassed or humiliated by sitting behind the curtains," and went out. I did not see him again. I talked with him with the greatest of courtesy; there was no commotion or confusion. Asked if complainant refused to be served at an end table, the witness first answered, "Yes," but on cross-examination qualified that answer, saying, "He did not exactly say he didn't care to sit behind those curtains. He questioned whether I could curtain it (the table) off after he did sit down there." I did not send for him because at no time was one of the end tables vacant; there could have been a vacant seat but not a vacant table. There was no time when I could have reserved space for him. When the diner was taken off the train at Greensboro about 9 p. m., "there were a lot of passengers not served."

A steward has no discretion about mixing the races, in violation of the company's regulations.

Testimony of witness White, a dining-car waiter employed by defendant continuously for 28 years.—My regular run is on train No. 35 out of Washington. On Sunday, May 17, 1942, I served the end tables in the diner on that train. I first saw complainant standing in the end of the car near the kitchen talking to the steward shortly after we made the call for dinner at about 5:30 p. m. I heard no part of their conversation. At that time, three white people were seated at the larger end table, and the two-seat end table was fully occupied. When complainant came to the diner the second time, white people were seated at both end tables; but I do not remember how many. I only saw him twice. Either the first or second time that he was in the diner, I offered to serve him in his space, and he

declined. Both times I saw complainant, other people were in line waiting to be seated. The diner was continuously filled from the time we first started serving until we quit. We usually are very crowded on Sundays. Complainant was the only Negro passenger who came into the dining car on the trip.

Upon the evidence, due weight being given the mutually corroborative testimony of witnesses Farrell and White, the manner in which defendant usually seats its dining-car patrons, and the crowded condition of the train, we [fol. 299] find these facts: When the dining car was opened at about 5:30 p. m., a number of passengers were waiting to enter. The car filled promptly. When all tables other than the two end tables had been occupied, no Negro passenger having appeared, white passengers were seated at the end tables. Some of the passengers who were in line when the diner was opened remained standing when the car was filled. Complainant did not take a position in the line but walked past people who were waiting to be served in turn. At least one seat at an end table was empty when complainant first demanded service, but neither then nor later was either end table entirely vacant. The diner was filled continuously, passengers from the line taking seats as soon as others vacated them, from the time defendant began serving dinner until it became necessary to decline further service so that the car would be cleared of patrons when the train reached Greensboro. Complainant was tendered, and declined, service in his pullman space without charge therefor in addition to the regular dining-car prices. The service offered him differed from that furnished in the dining car only as to the place of service. The steward did not send for complainant, as he promised to do, because at no time during the meal was there available space in which complainant could be served in the diner in a compartment separated from tables that were occupied by white passengers. Complainant was one of many passengers who sought dining-car service and had not been served when the diner was removed from the train at approximately 9 p. m.

The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate

passengers. See *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71, and cases therein cited. Section 3 (1) of the act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In *Mitchell* v. *United States*, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus it is seen that substantial equality of treatment only is required of the carrier.

It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding [fol. 300] with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

We find that complainant was subjected to undue and unreasonable prejudice and disadvantage in the respect already stated. As defendant's present instructions to

its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose.

Turning now to the prayer for damages: The complaint in this regard asks:

(4) That reasonable and just damages, attorneys' fees and costs be assessed against the Railroad for the aforesaid violations;

The matter of damages was not argued in the initial brief filed by the complainant. In the request for specific findings, he asked for a finding by us:

Fourth: That the complainant has proved the allegations contained in this verified complaint and is entitled to the relief prayed for therein including such damages as to the Commission may seem reasonable and just.

In his exceptions to the report proposed by our examiner, which did not discuss the claim for damages, the complainant excepted in that—

The proposed report admits that the dining car accommodations furnished the complainant were "unjustly discriminatory and unduly prejudiced," yet it recommends dismissal of the complaint. The complainant sustained damages, suffered embarrassment and hunger, was not served, and has been compelled to pay several hundred dollars in costs and attorneys' fees (admittedly not chargeable to the respondent, but nevertheless real to the complainant). The report gives no reason for the failure to recommend damages which the Act clearly allows.

Our jurisdiction to award damages flows from section 8 of the act. That section is as follows:

Sec. 8. That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited [fol. 301] or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

The right to recover under section 8 is limited to the pecuniary loss suffered and proved. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 206. Compare *Crosby* v. *St. Louis-S. F. Ry. Co.*, 112 I. C. C. 239, 243. Before any party can recover under the act, he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury. *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447, 460.

We have already shown in abstract form the substance of the complainant's testimony with respect to the claim for damages. In his direct examination, the claim was not mentioned, nor did he indicate that he had sustained any damage.

On redirect examination the complainant testified:

Q. Tell us what damages you suffered?

A. Oh, I was hungry. I felt very inconvenienced and somewhat ill the next morning.

Q. Were you embarrassed?

A. I was very seriously embarrassed.

Q. In what way?

A. I was embarrassed before the patrons whom I am sure observed my predicament. And I was embarrassed before the servants on the car, and my own feelings were very seriously——

Q. When he refused to serve you, when you saw white people getting up, being seated in the "Jim Crow" cars, when he suggested to you you'd have to sit by the curtain, you suffered personal embarrassment and inconvenience to a great extent, did you not?

A. Absolutely.

The statement with respect to inconvenience and being somewhat ill the next morning is not supported by any allegation in the complaint, and was not elaborated in the course of the testimony.

With the foregoing principles in mind, we find that the record does not establish that the complainant suffered any pecuniary damage because he was not served with the evening meal as he sought, or because certain white persons were so served while he was denied proper opportunity to purchase from the defendant such a meal for himself. While complainant testified that he "felt very inconvenienced and somewhat ill" the following morning, the

degree and extent of his illness, and whether the illness was related to the omission of defendant to serve him with a meal, and whether he suffered any pecuniary loss as the result thereof, are not in any wise established.

[fol. 302] From the earliest days, it has been considered by us that we could make no award of reparation beyond the amount of damages shown with reasonable certainty, and that a finding of damages cannot be based on general allegations or statements alone. As our jurisdiction is confined to the awarding of "damages sustained in consequence of any * * * violation" of part I of the act, we cannot award either nominal damages or substantial damages in the way of smart-money, or for a punitive purpose, or to serve as an example to others. Under the act, we may award damages only for the private wrong and to the extent of the private damage suffered. For any public wrong, the penalties are collectible by the government alone. *Pennsylvania R. Co.* v. *International Coal Mining Co., supra*, at page 206.

Upon this phase of the case, we therefore find and conclude that no basis for an award of reparation for damages has been shown, and that it does not appear that the complainant has sustained any damages in consequence of the violation of part I heretofore found. We have no jurisdiction in this proceeding to award attorneys' fees, *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, or costs, *Pittsburgh & W. Va. Ry. Co.* v. *Interstate Commerce Commission*, 280 Fed. 1014.

The complaint will therefore be dismissed.

[fol. 303] At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 13th day of May, A. D. 1944

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

No. 28895

ORDER

This proceeding being at issue upon complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, division 2.

W. P. Bartel, Secretary. (Seal.)

[fols. 303A-304] At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 18th day of September, A. D. 1944.

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

No. 28895

ORDER

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of complainant for further hearing and oral argument;

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fols. 305-306] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28895

ELMER W. HENDERSON

v.

SOUTHERN RAILWAY COMPANY

Transcript of Hearing

Hearing Room A, Interstate Commerce Commission Bldg. Washington, D. C. Tuesday, October 15, 1946.

Met, pursuant to notice, at 9:30 o'clock a. m.

Before: HORACE W. JOHNSON, Examiner.

APPEARANCES:

B. V. Lawson, Jr., 2001 11th Street, N. W., Washington, D. C., appearing for Elmer W. Henderson.

A. J. Dixon, Southern Railway Building, 15th and K Streets, N. W., Washington, D. C., appearing for Southern Railway Company.

[fol. 307] PROCEEDINGS

Exam. Johnson: All right, gentlemen, we might as well proceed. I believe the parties are ready.

The Commission has set for hearing at this time and place Docket No. 28895, Elmer W. Henderson versus Southern Railway Company.

Who appears for complainant?

Mr. Lawson: I do, Mr. Examiner, B. V. Lawson, Jr.

Exam. Johnson: Of Washington, D. C.?

Mr. Lawson: Washington, D. C., yes.

Exam. Johnson: And for the defendant?

Mr. Dixon: A. J. Dixon, of Washington, D. C., for the defendant.

Exam. Johnson: We are, of course, familiar with this case because this is a rehearing. On May 13, 1944, the Commission issued a report in this case, in which it found that failure of defendants to furnish dinner service to complainant, a member of the negro race, in its dining

car in connection with a journey made by complainant on May 17, 1942, from Washington, D. C., to Atlanta, Georgia, to have subjected complainant to undue and unreasonable prejudice and disadvantage.

It further found that no basis was shown for an award of reparation and that no order for the future was necessary. The complaint was dismissed.

[fol. 308] On September 13, 1946, however, the Commission issued an order stating that upon further consideration of the record in the above entitled case, and of the decree of the statutory court in and for the District of Maryland, entered February 13, 1946, it is ordered that the above proceeding be and it is hereby reopened for further hearing. And today we are to have the rehearing.

I might make the statement, also, that the report of the statutory court referred to ended by saying, "For the reasons given herein, the order of the Commission dismissing the complaint must be set aside, and the case remanded to the Commission for further proceedings in the light of the principles outlined in that case."

As you understand, this is a rehearing of the case, and we will proceed by having complainant call its first witness.

Mr. Lawson: Mr. Examiner, we have no testimony, no witnesses. There is no dispute, I think, about the facts and my understanding of the court's decree is that it is a matter of law and a matter of new or certainly different regulations. So for that reason we don't have any testimony.

I would at the proper time like to make a short argument, but other than that we have nothing.

Exam. Johnson: I think we could hear the argument now, if you care to. You are going to file a brief, though, in this case?

[fol. 309] Mr. Lawson: I am going to file a brief, yes, but if it is all right with the Commission, I would prefer to make the one argument to which I would ordinarily be entitled after the defense has put on its case. It might save time.

Exam. Johnson: Well, I think that will be satisfactory, will it not, Mr. Dixon?

Mr. Dixon: All right with me.

Exam. Johnson: All right, then, Mr. Lawson, we will hear you then after we hear witnesses that the defendants have.

Mr. Dixon, you may call your first witness.

Mr. Dixon: Mr. McClain appeared as a witness in the first hearing. I don't know whether you want to swear him again or not.

Exam. Johnson: Is the other witness a new witness?

Mr. Dixon: Yes.

Exam. Johnson: We will swear both of them.

(Witnesses sworn by Examiner.)

R. K. McClain was sworn and testified as follows:

Direct examination:

Q. Are you the same R. K. McClain that testified in the previous hearing in this case?

A. I am.

Q. Are your duties and responsibilities with the Southern Railway Company the same now as they were then?

[fol. 310] A. They are.

Q. Since the last hearing, has the Southern Railway changed its dining car rules?

A. It has.

Q. I hand you a paper and ask you if that is the current rule?

A. It is.

Q. When did that rule become effective?

A. March 1, 1946.

Q. Why was the rule changed?

A. To meet the wishes of the court.

Q. It was changed to conform with the opinion of the court in Henderson versus the U. S.?

A. That is right.

Mr. Dixon: I ask that document be identified as an exhibit.

Exam. Johnson: That will be Exhibit No. 3.

(Exhibit No. 3, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Mr. McClain, Exhibit No. 3 shows the dining car rules which are presently in effect, and which are being observed by the stewards on the Southern Railway Company today?

A. That is correct.

Q. And as you say, it became effective March 1, 1946?

A. Yes.

Q. Is any change contemplated in the dining cars of the [fol. 311] Southern Railway? I am speaking now of structural changes?

A. Yes. We had curtains for a partition so as to have separate compartments. We now have a plan for permanent partitions that will be placed in the cars.

Q. Where will those partitions be placed?

A. They will be placed between stations 1 and 2 in the body of the car.

Q. So as to separate the table reserved for colored folks from the other tables in the car?

A. That is correct.

Q. In connection with that plan, what do you propose to do with the table on the opposite side of the car?

A. That is to be made into an office for the steward.

Q. I hand you a photograph and ask you to tell us just briefly what it shows.

A. It shows in station 1 the table to the right, facing backward.

Q. Oh, I see.

A. Or facing, looking at the picture as here, to the left. The space set aside for colored patrons, and to the right looking at the picture as it is, it shows the office for the steward.

Q. Those two partitions you say are permanent partitions.

A. Permanent partitions.

Q. Approximately how high?

[fol. 312] A. Approximately five feet high.

Mr. Dixon: I ask that photograph be identified as Exhibit No. 4.

Exam. Johnson: It will be marked as Exhibit No. 4.

(Exhibit No. 4, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Mr. McClain, I hand you another photograph and ask you to please explain what it shows.

A. This shows the space which is set aside and reserved and assigned to dining car space for colored race.

Q. That picture shows the reserved table made up with the linen and silver in place, and the waiter standing nearby?

A. Set up for service.

Q. Set up for service?

A. Yes.

Q. And it shows also the permanent partition on the left, is that true?

A. That is correct.

Exam. Johnson: As I understand it, this partition takes the place of the curtain.

The Witness: That is correct.

Exam. Johnson: Is that right?

The Witness: Yes.

Exam. Johnson: The curtain has been removed.

The Witness: That curtain on that one car has been [fol. 313] removed. On a number of the other cars the curtains are still in place, but our plans are as the cars go through the shops to equip them in that manner.

Mr. Dixon: Mr. Examiner, I ask that the photograph showing the table made up with the waiter standing nearby be identified as Exhibit No. 5.

Exam. Johnson: It will be marked Exhibit No. 5.

(Exhibit No. 5, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Mr. McClain, I hand you another photograph and ask you what it shows.

A. This photograph shows the space assigned not set up for service.

Q. What is the purpose of the cord?

A. The cord is shown there to keep any passengers out until it was set up and to be occupied by the colored race.

Mr. Dixon: I ask that photograph be identified as Exhibit No. 6.

Exam. Johnson: It will be marked Exhibit No. 6 for identification.

(Exhibit No. 6, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. I hand you another photograph, Mr. McClain, and ask you what it shows.

A. This picture shows the space opposite the space reserved for the colored race, which is assigned to the [fol. 314] steward as an office. He has a cash register, with space set aside for any materials and supplies which he might need at that point.

Mr. Dixon: I ask that photograph be identified as Exhibit No. 7.

Exam. Johnson: This exhibit will be identified as Exhibit No. 7.

(Exhibit No. 7, Witness McClain, marked for identification.)

By Mr. Dixon:

Q. Why is the steward's office being placed opposite the reserved table?

A. It gives the steward an opportunity where he can see the entire body of the car, as well as the kitchen entrance, so that he can supervise the operation of the car.

Q. As I understand it, the general plan is to reserve this one table containing four seats exclusively for colored people?

A. That is correct.

Q. And the remaining tables in the car will be reserved exclusively for white people?

A. That is correct.

Q. And the steward's office will be placed opposite the reserved table?

A. That is correct.

Q. And that will be done as the cars go through the shops for repairs?

[fol. 315] A. That is our present plan.

Q. And I believe you told the Examiner that only one car has been changed so far; is that correct?

A. Only one car as I recall has been equipped so far.

Q. Do you have anything further you want to say about either our rule or the pictures?

A. No, nothing further, unless there are some further questions.

Mr. Dixon: I ask that our Exhibits 3 to 7 be received in evidence.

Exam. Johnson: Is there any objection to their receipt, Mr. Lawson?

Mr. Lawson: No objection.

Exam. Johnson: Exhibits Nos. 3 to 7, inclusive, will be received in evidence.

(Exhibits 3 thru 7, Witness McClain, received in evidence.)

Mr. Dixon: That is all on direct.

Cross examination.

By Mr. Lawson:

Q. Mr. McClain, this new regulation, Exhibit 3, and these other exhibits, representing possible structural changes in the car, as I understood you to say, were made and issued because of the decision in this case?

A. Yes.

Q. Well, weren't their issuance, and the contemplated structural changes based on the Virginia law?

[fol. 316] A. Well, we had in mind it would meet the requirements on all of the southern states.

Q. You realize this happened in Virginia, that we are concerned only with that?

A. Yes.

Q. Wasn't it then based on the Virginia statute, which you remember—well, I don't need to refresh your recollection. I suppose you remember it in general.

A. The Virginia is similar to the other states.

Q. Yes.

A. And this meets the requirements.

Q. And you had the Virginia statute in mind, as well as the decision in the Henderson case when you issued these new regulations?

A. Well, the statute of Virginia is similar to the other states, and when this decision came out, we found that this would meet the requirements of all of the states in which we operate where the segregation laws are effective.

Q. So that you did have the Virginia statute in mind?

A. Yes.

Q. Under the new regulation and structural change, you reserve only the one table?

A. That is correct.

Q. What would be the situation in the event that more than four people come into the dining car, four negroes [fol. 317] come into the dining car at one time?

A. They would be required to wait until the space was vacant and that assignment is the same as if more white passengers come than there was space for in the car, they would be required to wait until the space was vacant.

Q. Well, now, in the court's decision, and I am referring to the decision of the federal court, the statutory court, are you familiar with it, Mr. McClain?

A. I remember reading it over. There may be some points that I am not familiar with.

Q. In that decision, the court said that in the situation which I just suggested, where more negroes came in than were able to be seated immediately at the tables reserved for negroes, that equal treatment would require that those negroes be seated at other space in the diner. In the light of your prior testimony, you would not do that?

A. That is correct; we would not.

Q. So that you would then deliberately be violating this court's decision, is that right?

A. Not any more than we would against the other race. There is certain space set aside for the colored race, certain for the white race. If the dining car space assigned to white passengers was full and the colored space was empty, we would require the white passengers to wait until there was a vacancy in their assigned space.

[fol. 318] Q. Well, now, would you consider that discrimination against the white race?

A. No. Equal facilities are furnished for both races.

Q. Let us get an understanding. Do I understand you to testify that if more than four negroes came into the diner at one time, and therefore could not be seated, and there were other tables in the dining car vacant, that you would not seat the negroes at those other tables?

A. Your understanding is correct.

Q. Mr. McClain, the Virginia statute says that there shall be complete separation of the races, a partition with a door. Do you realize that this contemplated structural change does not meet that requirement?

A. No, I do not.

Q. Why, Mr. McClain, do you put the office right opposite the table reserved for negroes?

A. It is the most convenient point for the steward to be placed where he can supervise both ends of the car.

Q. Do you regard this office and the necessary and natural business transactions going on there, namely waiters going through and to, and the natural confusion attendant upon the location of this office, a burden or discrimination regarding negroes?

A. I do not.

Q. Why, then, could you not leave this office where it is, [fol. 319] and put this reserved Jim Crow table at the other end of the car?

A. Why, it is better suited to come to this end of the car. The steward at that location can better supervise the handling of the car, and this station suits better than it would at the other end of the car.

Q. Why?

A. The partition and everything fits better under this plan which we have worked out to divide the car.

Q. The dimensions of the car are the same in both ends, are they not?

A. They are.

Q. Why do you say the partitions fit better in one end of the car than the other?

A. Because of the construction of the car fits better at that end than it does at the other end.

Q. Well, now, why?

A. Due to the construction of the car.

Q. What is that construction?

A. The plans show there as to the part of the car it is necessary that the steward give attention to the waiters going and coming from the kitchen to avoid congestion there.

Q. Well, now, is it necessary to put this Jim Crow table up in that corner?

A. It fits in better there than it would at the other end. [fol. 320] Q. Well, now, that is what I am getting at, Mr. McClain. Why do you say it fits in better opposite this office than at the other end of the car?

A. Well, the conditions if it was the other end of the car, the only difference there would be that directly across the aisle would not form as good a separation as it would at the present end, where it is located.

Q. I don't understand what you mean by saying it would not form as good a separation. Will you explain that?

A. Well, opposite that table would be the white race, and it would not afford as good a separation as it does at the present end.

Q. Well, according to the Virginia statute, you would be required to completely partition off the Jim Crow table at any rate, and negroes and whites would be completely separated with that were you to conform adequately to the Virginia statute.

A. My understanding is that the present partition meets the requirements.

Q. Do you regard, Mr. McClain, negroes behind this partition and opposite this office with all of the attendant confusion, enjoying the same facilities as white people?

A. Absolutely.

Q. Do you think that it would be as quiet and peaceful and as enjoyable eating a meal behind this partition op-
[fol. 321] posite the confusion of this office as it would be in the other end of the car, where neither the partition nor the office is situated?

A. I say more so, for the reason that they are more in private there than it would be to be over in the body of the car, and probably be less noisy there and less confusion than would out in the body of the car.

Q. You say private. It is enforced privacy, isn't it?

A. What?

Q. Enforced privacy?

A. Assigned space.

Q. What is the difference between that assigned space and enforced privacy?

A. Well, there might be considerable difference on that. This is assigned space, and it is equally assigned to meet the requirements of the segregation laws, and other space is assigned to the white, and this is assigned to the colored. There is no discrimination there.

Q. Excuse me. What space is assigned? What space do white people have to take.

A. The space assigned to them.

Q. What space is that?

A. That is the space other than assigned to colored.

Q. The whole diner except these four seats?

A. That is correct.

[fol. 322] Q. What is the space which negroes are compelled to take?

A. Space assigned to them.

Q. Namely, the Jim Crow table partitioned.

A. Yes.

Q. And do you regard the compulsory and enforced privacy of negroes as discriminatory?

A. No.

Q. Do you regard that sort of enforced privacy on negroes as an undue burden on interstate commerce?

A. No more than that would be on the white traveler, because they have assigned space which they have to occupy.

Q. And I just want to get this straight for the record. The assigned space of white people is the whole car, except the Jim Crow table.

A. It is the other part of the car.

Q. Well, what other parts of the car remain, other than the Jim Crow table?

A. That is all.

Q. So they have then the whole car except the Jim Crow table.

A. That is correct.

Mr. Dixon: They would not have the kitchen and the hallway and the pantry.

The Witness: That is right.

Mr. Lawson: That is right. I meant the diner.

The Witness: The colored traveler has the same advan-
[fol. 323] tage to that as the white traveler.

Mr. Dixon: I think we understand.

By Mr. Lawson:

Q. You testified as I recall that the steward could see the whole car better from this end, is that right?

A. That is correct.

Q. Couldn't he see it equally as well from the other end?

A. No, he could not supervise the entering and leaving of the pantry to the kitchen, as well from the upper end of the car.

Q. Mr. McClain, in reference to Exhibit No. 6, I think it is, this table here——

A. Yes.

Q. —I did not understand why the rope or cord was around that table.

A. That cord is set up there to avoid any white passengers entering that space or anybody entering that space until it is set up for service. Also you will notice that there is a cord just across the aisle which is set over the steward's space to avoid anyone entering that space.

Q. This table is located opposite the steward's office?

A. That is correct.

Q. This table, then, is for either white or colored as the situation may require?

A. No, that table is for colored, set aside. That space, even though no colored passengers entered the car for [fol. 324] service, that space is not allowed to be occupied by the white race.

Q. This then is the only table reserved?

A. That is correct.

Q. Do you know, Mr. McClain, anything about the statistics relative to increased negro travel?

Mr. Dixon: We are going to show that.

Mr. Lawson: You are going to show that?

By Mr. Lawson:

Q. Is it your feeling, Mr. McClain, that this one table adequately will accom-odate the negro dining car patrons in the future?

A. It does at the present time, and we don't know what the future will hold, but we anticipate that from past history that it will be sufficient.

Q. Do you know whether or not subsequent to the issuance of this regulation of March 1946, your railroad has been sued as the result of the violation thereof?

A. I know of suits, yes.

Q. Therefore, would you say that this latest regulation is no solution to the problem?

A. We think it is a solution.

Q. Notwithstanding the lawsuits that have been filed?

A. That is right.

Q. Mr. McClain, are you a lawyer?

A. No.

Q. Are you familiar with the Supreme Court decision [fol. 325] in the Morgan case?

A. No, only in a general way.

Q. If I were to tell you that the Supreme Court of the

United States, subsequent to the ruling in this Henderson case, held that in interstate bus transportation there shall be no form of racial segregation, notwithstanding any state statute, would you say that your regulation conforms to that decision?

A. Yes, until the courts say that they do not.

Q. Well, now, my understanding is that the Supreme Court has already said that no form of racial segregation shall obtain in interstate motor bus transportation, and I have in my hand a decision of the U. S. Court of Appeals of the District of Columbia, which says the same thing regarding interstate passenger car transportation.

Mr. Dixon: That is street cars.

Mr. Lawson: No, this is Southern Railway, just recently decided. That was two weeks ago.

By Mr. Lawson:

Q. In the light of those two decisions, do you feel that your racial segregation in dining cars conforms to the court's ruling?

A. I do.

Mr. Lawson: That is all.

Redirect examination.

By Mr. Dixon:

Q. I just want to get one thing straight, Mr. Mc-
[fol. 326] Clain.

On direct you testified that these new rules, effective March 1, 1946, were promulgated because of the federal court's decision in the Henderson case?

A. Yes.

Q. And that is still the reason, isn't it?

A. It is.

Q. And the fact that the state laws provide for segregation is merely incidental to this rule shown in Exhibit No. 3.

A. That is correct.

Q. In other words, the rules shown in Exhibit No. 3 were not based on the state laws, were they?

A. No, but we thought they complied with them.

Q. On cross-examination you stated that the steward from his new office space could better supervise the manage-

ment of the car, and you referred particularly to the fact that he could see into the pantry and the kitchen.

A. Yes.

Q. I am going to hand you Exhibit No. 4, and ask you whether that exhibit does not bear out your statement.

A. It does.

Q. If the steward's office were at the other end of the car, he could not see around that partition which separates the buffet from the body of the dining car, could he?

A. That is correct.

[fol. 327] Mr. Dixon: That is all I have.

Exam. Johnson: As I remember, the passengers came around the side that the steward is on.

The Witness: They came through that side, that is correct.

Exam. Johnson: The same side.

The Witness: Opposite the entrance from the pantry.

Exam. Johnson: And on the other side is where the waiters come and go from the pantry?

The Witness: Yes.

By Mr. Dixon:

Q. Bearing on the Examiner's question, Mr. McClain, looking at Exhibit No. 4, do the passengers come around the buffet from the right or left?

A. They come from the right, this entrance.

Q. What is over to the left?

A. The entrance to the pantry.

Q. And kitchen?

A. Yes.

Q. And the steward can see that from his position there in his new office space?

A. He can.

Q. Can he not?

A. Yes.

Mr. Dixon: That is all.

Exam. Johnson: Do you have something further, Mr. Lawson?

[fol. 328] Mr. Lawson: After you.

Exam. Johnson: Mr. Lawson asked about the section reserved for the colored and for the white, and I got the im-

pression from his question that the white people were allowed to wander to any of the tables. I don't believe the record brings that out.

The Witness: No, they are allowed all other tables except this table 1.

Exam. Johnson: Yes, but I mean here, I think the record stated that they were assigned to the table in order to have all of the waiters working at once, that each waiter has a station and maybe the first one would be a white person who would be assigned to station No. 6; maybe the next one to No. 1, in order to balance.

The Witness: In other words, so they would not be overcrowded, that is right.

Exam. Johnson: I did not get the impression that a white person could go to any table he wanted to go to. Was that your question?

Mr. Lawson: That was my question. He did not answer it the way you suggested. The direct answer was they could go any place they wanted to. My experience in dining cars is that white and colored people can go anywhere they want to in the diner.

The Witness: As a general rule they are assigned space, [fol. 329] as they enter the car.

Recross-examination,

By Mr. Lawson:

Q. White people don't have to go; if a waiter or steward takes a chair and offers it to a white person, if that white person does not want to sit there, he may go with his friends to some other table. Is that not so?

A. Pursuant to the conditions of the car. If there is no reason why they should not, the steward does not object, but if there is reason, the steward will object and say, "We would rather you would sit here for these reasons."

Q. Crowded conditions or few waiters.

A. Yes.

Q. Anywhere, a white person can sit anywhere he wants to in the diner?

A. Anywhere a space is, and there is no vacancy, and if there is no unusual condition, just the same as a colored person could enter either one of the chairs that were assigned to them in the space.

Q. Nowhere else.

A. No other space in the car except space assigned to them.

Exam. Johnson: The question came up about whether this was adequate to take care of the colored and the answer was that at the present time it would. I think the record shows that at the time this case was originally heard, the testimony was one colored to a thousand white. Wasn't [fol. 330] that correct?

Mr. Dixon: That was a mighty rough estimate. I am willing to admit that estimate was rough. We are going to show you facts.

Exam. Johnson: You are?

Mr. Dixon: Yes.

Exam. Johnson: That might be entire different at the present time.

Mr. Lawson: I will object to any showing of facts, because the Supreme Court in Mitchell case has said volume of traffic has nothing to do with it.

Mr. Dixon: I thought you called for the facts.

Exam. Johnson: That is not what I had in mind. What I had in mind was, would this one table be adequate for the number of colored that would probably come to the diner, as compared to six additional that the white people would have.

Mr. Dixon: Six additional what?

Exam. Johnson: Tables.

Mr. Lawson: Many more than that, eight or ten more.

The Witness: There would be ten tables.

Exam. Johnson: Ten tables?

The Witness: Ten tables.

Exam. Johnson: Ten to one.

The Witness: Ten to one.

Mr. Lawson: My point is that any testimony regarding [fol. 331] the number of negro patrons is inadmissible by reason of the Mitchell case.

Exam. Johnson: You brought the question up there yourself, Mr. Lawson, of whether that would be adequate to take care of the colored.

Mr. Lawson: Yes, but that does not open up the whole question of statistics. That was simply one question for which no basis was laid, so my point is that as a matter of evidence, the whole record is not opened up to testify

regarding volume of traffic, in the light of the decision in the Mitchell case.

May I ask Mr. McClain a couple of other questions?

By Mr. Lawson:

Q. You said you thought these new regulations complied with the Virginia statute, is that right?

A. That is right.

Q. So that you issued these new regulations not alone on the Henderson case decision, but in what you thought was the conformance to the Virginia statute.

A. Well, these new instructions were issued due to the decisions, of the courts, but that decision——

Mr. Dixon: You said courts.

The Witness: The courts, yes.

Mr. Dixon: The court, c-o-u-r-t.

The Witness: The court, yes. But even with the instructions we issued we feel that they comply with the Virginia statute.

[fol. 332] Q. So that at all times you have had in your mind the Virginia statute.

A. Not necessarily. No, we set it up the first time, which we thought would take care of the situation. The courts ruled differently and we changed the rule to conform to the court's decision.

Q. Mr. McClain, I think this is basic towards this whole situation, and I would like to have you give me a categorical answer as to whether or not you had in mind the Virginia statute when these new regulations were issued.

A. No.

Q. You did not?

A. No.

Q. So that you issued these regulations in disregard of the Virginia statute?

A. We were of the opinion that the new regulations complied with the Virginia statute.

Q. Well, now, I understood you to say just a moment ago that you did not have the Virginia statute in mind when you issued these regulations.

A. That is correct.

Q. And yet you now say that you had it in mind.

A. I say this——

Q. You thought that they conformed.

A. I say this, that we had our instructions with reference [fol. 333] to the handling of the segregation of the races. When this case came up, the courts ruled that our practice was not right. Then we modified the rules and changed them to such an extent that we believe it meets the requirements.

Mr. Dixon: Of what?

The Witness: Of the court.

By Mr. Lawson:

Q. Of the court?

A. Yes.

Q. Well, now, the Virginia statute says that there shall be a permanent—I don't intend to be quoting, but there should be a solid or permanent partition, is that right?

A. I am not familiar with that.

Q. If the Virginia statute says that, why, then, do you now change from the use of the curtain unless you are doing it in conformity with the statute.

A. We changed from the use of the curtain to this partition because we thought it would be more satisfactory to everybody. The curtain, we understand, would be the same as the partition, but we intend to change the cars, because we believe it would be more satisfactory to have the partitions.

Q. Why?

A. Because it would probably be better than the curtain.

Q. Why?

A. Probably for several reasons. They are easier to keep clean, and they are more permanent, won't require so much [fol. 334] repair and attention.

Q. And that of course is for the convenience of the railroad?

A. Absolutely.

Mr. Dixon: Do they look better?

The Witness: They look better. The appearance is better.

By Mr. Lawson:

Q. Mr. McClain, you say that these regulations were made for the convenience of the railroad?

A. These regulations—which regulations?

Q. Regarding the——

A. The change in partition?

Q. Yes, and setting up of the office.

A. Yes.

Q. Did you consider the comfort of the passengers when you made these regulations?

A. Yes. We feel that the use is just as comfortable as the curtains, and just——

Q. And just as convenient?

A. Yes.

Q. Do I understand you then to testify that a negro diner car patron behind this partition, sitting on one of these end tables where waiters are going and coming and the noise of the cash register, and so forth, that that is just as comfortable and convenient as the white patron sitting at the end of the car where none of that confusion is going on?

[fol. 335] A. Absolutely.

Q. You testified that you took into consideration the convenience and comfort of negro patrons when you set up these regulations, is that right?

A. I said yes, in setting up this space, we picked the space that would best serve everybody.

Q. Wherein specifica-ly does the new regulation increase the comfort and convenience of negro passengers?

A. Similar to the other stations, the same space.

Q. Well, now, specifically point out the similarities between Negro patrons and white patrons.

A. They have space assigned to them. The white traffic has space assigned to them. This space is like accomodation.

Q. Do you regard this enforced—or this assigned space, you call it, opposite this office equal accom-odations as white patrons in the body of the diner?

A. Absolutely.

Q. One final question that I think I have asked, but it has not been specifically answered. Do you regard the new regulations as an improvement so far as negro patrons are concerned?

A. Yes.

Q. How?

A. The space would be available at all times. I should say this, space is definitely assigned to the colored patrons, [fol. 336] which is to be occupied by them, only.

Q. Space for how many patrons?

A. Four.
Q. Four only?
A. Four only.

Mr. Lawson: That is all.
Mr. Dixon: That is all.
Exam. Johnson: Witness excused.

(Witness excused.)

Exam. Johnson: Call your next witness.

F. C. THOMAS was sworn and testified as follows:

Exam. Johnson: You have already been sworn?
The Witness: Yes.

Direct examination.

By Mr. Dixon:

Q. Will you state your name, please?
A. F. C. Thomas.
Q. What is your occupation?
A. Superintendent of Dining Cars, Southern Railway, Atlanta, Georgia.
Q. How long have you been in the dining car department of the Southern?
A. It will be 28 years December 20 of this year.
Q. Mr. Thomas, did you make a test to determine the number of white and colored passengers using dining car [fol. 337] service on Southern Railway between Atlanta and Washington?
A. I did.
Q. I hand you an exhibit which I will ask be marked for identification as No. 8.

Exam. Johnson: It will be marked for identification.

(Exhibit No. 8, Witness Thomas, marked for identification.)

By Mr. Dixon:

Q. I will ask you to please tell us what it shows.

Mr. Lawson: Mr. Examiner, at this point I wish to register formally my objection to the admission of this

testimony, and I do that on the basis of the Mitchell case, which says that volume of traffic has nothing to do with the situation of this kind.

Exam. Johnson: Mr. Lawson's objection will be shown in the record. Go ahead.

By Mr. Dixon:

Q. Go ahead, Mr. Thomas.

A. Well, this shows the number of colored patrons between the heaviest points on our railroad, which is between Washington and Atlanta. That is a period of ten days, May 14 to 24, inclusive.

Q. What year?

A. Of 1945.

Q. Just tell us the result down at the bottom, how many. I will ask you how many meals were served during that period?

[fol. 338] A. Well, there was a total.

Q. The total number of meals served.

A. 37,615.

Q. How many of those served to colored service people?

A. Colored service?

Q. Yes.

A. 706.

Q. How many were served to colored civilians?

A. 446.

Q. And how many were served to white passengers?

A. To white passengers.

Q. In other words, in order to get the number of whites, you would have to subtract 1,152 from 37,615, is that right?

A. That is correct.

Mr. Lawson: Wouldn't you have to subtract all of these figures; you see, all of these are negroes.

Mr. Dixon: That is the total of 1,152 colored served.

By Mr. Dixon:

Q. Out of 37,615?

A. Yes, out of 37,615 passengers served between these dates, during this ten day period.

Q. Mr. Thomas, that test was made for what purpose, do you remember?

A. Just to ascertain the number of colored passengers we were serving, actually serving on the trains between the points.

[fol. 339] Q. Was that exhibit introduced in any other case?

A. Yes, sir, it was.

Q. Do you remember that?

A. Yes, sir.

Q. Do you remember the name of that case?

A. The Mays case.

Q. And that is the case before the ICC?

A. That is correct.

Q. Since that time have you made a further test along the same lines?

A. I have.

Q. I hand you a further exhibit, which I ask to have marked for identification as No. 9.

Exam. Johnson: It will be marked for identification.

(Exhibit No. 9, Witness Thomas, marked for identification.)

By Mr. Dixon:

Q. What does that exhibit show in a general way?

A. This exhibit shows a check for ten day period October 1 to October 10, inclusive, 1946, between Washington and Atlanta, Georgia.

Q. And during that period how many meals were served to colored service people?

A. Colored service people, 149.

Q. How many to colored civilians?

A. 723.

[fol. 340] Q. And how many to white passengers?

A. 19,917.

Q. Are these two exhibits true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Were they made under your supervision and direction?

A. That is correct.

Mr. Dixon: I ask that the exhibits be received.

Exam. Johnson: The other pages are just the breakdown?

Mr. Dixon: That is right.

Exam. Johnson: Of the summaries?

The Witness: That is the daily.

Exam. Johnson: The same thing.

The Witness: The daily record, yes, sir.

Exam. Johnson: Exhibits 8 and 9 are received in evidence.

(Exhibits 8 and 9, Witness Thomas, received in evidence.)

Mr. Lawson: I did not register my objection to Exhibit 9.

Exam. Johnson: The same objection?

Mr. Lawson: The same objection, and I want to amend both objections by saying the reason for, one, the decision in the Mitchell case, and second, the decision in the Henderson case, which requires that these reservations for negroes should be absolute.

Mr. Dixon: As I understood Mr. McClain, the reservation [fol. 341] for negroes is absolute.

Mr. Lawson: The reservations are for only four. We contend there is a difference.

Mr. Dixon: That is all I have on direct.

Cross-examination.

By Mr. Lawson:

Q. Mr. Thomas, did you yourself compile this record?

A. It was under my supervision. Each steward as he went out was told to give us this record of his division, and they were turned in at the end of each trip.

Q. But you yourself did not make any part of this record.

A. I supervised the making of the record.

Q. Are you testifying from any original notes taken during any part of this?

A. Oh, no, this just is the record.

Q. Who compiled this record?

A. This is compiled by my office force.

Q. And they gave it to you?

A. That is right.

Q. As you testified?

A. Yes.

Q. Take page 2 of this record, of the photostatic record.

A. Of the photostatic record?

Q. The May 1945 record.

A. All right.

[fol. 342] Q. Who, if you know, compiled the second page?

A. That was compiled in my office.

Q. I mean what steward?

A. Each steward turned in his report.

Q. Well, what steward turned in the record as indicated on page 2?

A. The various stewards that were running at that particular time.

Q. What were their names?

A. I don't have the record of the names. I would have to get that.

Q. Is any one of those stewards here?

A. None of them.

Q. And that is true of all of these, of this whole report?

A. That is correct.

Q. Now, calling your attention to the Exhibit 9, the same is true?

A. The same is true, that is correct.

Q. So from your own personal knowledge, you know nothing about the accuracy or method of obtaining these reports, do you?

A. Well, the stewards were instructed to know.

Q. No, if you just answer my question, then you can explain.

A. That is true.

Q. Answer yes or no.

[fol. 343] A. That is correct.

Q. I mean do you know of your own personal knowledge the method of compilation of this report, and their accuracy.

A. I do know how it is done, because each steward turned in his record showing the number of colored served.

Q. But you yourself have no personal knowledge.

A. I was not on the car. I could not possibly be.

Mr. Lawson: That is all.

Redirect examination.

By Mr. Dixon:

Q. Let me ask you a couple of questions.

How did you instruct the stewards to prepare these reports?

A. Well, each steward before leaving was instructed——

Q. Before leaving where?

A. Before leaving his home terminal—to give us a record of the number of colored served.

Q. And the number of whites?

A. And the number of whites served; the number of colored and white served.

Q. How about that military and civilian business? Was he told to do that?

A. He was told to separate the military and civilian.

Q. Then what happened? How did he give you that report?

A. He gave it to me in writing and gave it to me as he turned his reports in.

[fol. 344] Q. And did he send the meal checks to you?

A. No, sir. The meal checks go to the auditor of the passenger accounts.

Q. So he just made an independent report?

A. Made an independent report, and enclosed the reports.

Q. And sent it to you at Atlanta? And do you have any rough idea of how many stewards compiled these reports during the ten day period?

A. There is some approximately 18 or 20 stewards.

Q. You could not be with all of them at the same time?

A. I would not possibly; approximately 20 stewards.

Q. And when the reports were received at Atlanta, what did you tell the office force?

A. To take these reports and make a record of them, and put them in this form here.

Q. And did you make any check on the office force to see if they were carrying out your instructions?

A. Yes, sir, I did; I certainly did.

Q. As you testified in the beginning, you think they are true and correct?

A. I think they are correct. I see no reason for not being correct.

Mr. Dixon: That is all I have.

Recross-examination.

By Mr. Lawson:

Q. You say you instructed these stewards; orally or in [fol. 345] writing?

A. They were instructed orally.

Q. And they brought in their reports in writing?

A. That is correct. Each steward, as he left his home terminal was reminded of this, to do this.

Q. And do you have any of the original reports turned in by any of the stewards with you now?

A. I do not.

Q. You do not, therefore, testify from any of those original reports?

A. I testify from this report here.

Q. But not——

A. That is correct.

Q. But not from the original reports, just for the record.

A. Just for the record, that is correct. That is correct.

Mr. Lawson: I make another objection which I could not of course have made hitherto for the reason that I did not have this testimony.

I object to the admission of all of both of these reports for two other reasons than those I have previously suggested; one, it is clearly hearsay, and second, it is certainly not in conformity to the best evidence rule. I seriously urge those objections in the light of the testimony of Mr. Thomas.

Exam. Johnson: As I understand, Mr. Thomas, you gave [fol. 346] the instructions to the various stewards to bring in certain information.

The Witness: That is correct, as outlined here, the number of colored separating the colored military from the civilian; also showing the number of whites served on this trip.

Exam. Johnson: This is in answer to your inquiry for certain information?

The Witness: That is correct.

Exam. Johnson: And you being the superintendent, of course.

The Witness: It came under my supervision.

Exam. Johnson: And it is usual for you to do this?

The Witness: That is correct.

Exam. Johnson: Various kinds of reports?

The Witness: Various reports we get are handled in this same manner.

Exam. Johnson: The objection is overruled. I think that is all right. It will be shown in the record, however.

Mr. Lawson: The overruling of my objection will be shown?

Exam. Johnson: Yes. Anything further?

Mr. Dixon: No.

Mr. Lawson: I just wanted to briefly state my position in the light of the decision of the statutory court.

[fol. 347] Mr. Dixon: Mr. Examiner, may we go off the record for a moment?

Exam. Johnson: Yes, off the record.

(Discussion off the record.)

Exam. Johnson: On the record.

Mr. Lawson: This is no attempt to argue the case, because we shall file a brief and argue the case before the Commission. However, by reason of the fact that we did not at this time offer any testimony, I wanted to put in the record our position, which is, namely, that in view of the decision in the Henderson case, and in view of the very recent decision in the Morgan case, and in view of the decision——.

Exam. Johnson: What is the citation of the Morgan case?

Mr. Lawson: I only have it in advance sheets. It is not in the reports yet, I think.

Exam. Johnson: You can put that in the brief anyway.

Mr. Lawson: I will have it in the brief. It is Morgan against the Commonwealth of Virginia.

The other case of the U. S. Court of Appeals is Matthews et al versus the Southern Railway.

Our position is simply this, that if as in the Morgan case it be said by the Supreme Court, as it was, that any sort of racial segregation in interstate bus transportation is a burden on commerce, and if as the Court of Appeals [fol. 348] of the District of Columbia has said, any sort of racial segregation in interstate passenger transportation is a burden on interstate commerce, then we feel that any sort of segregation based on race in interstate dining car transportation is likewise a burden on interstate commerce, and that therefore the new regulations and structural changes issued and contemplated by the Southern Railway are based admittedly on race, and therefore a burden on interstate commerce.

Exam. Johnson: Briefs will be due November 14.

Mr. Lawson: Might we agree to allow that until December 1. I have a case out of town which will take some few days, and I would not have to bother with any further request. Is that agreeable, December 1?

Exam. Johnson: All right, I will grant that; December 1. Anything further? If not, the hearing is closed.

(At 10:30 o'clock p.m., the hearing was closed.)

[fol. 349] I.C.C. Docket No. 28895. Witness: McClain. Exhibit No. 3.

SOUTHERN RAILWAY SYSTEM
Office of Assistant Vice-President

Washington, D. C., February 19, 1946.

Transportation Department Circular No. 142. Cancelling instructions on this subject, dated July 3, 1941, and August 6, 1942.

SUBJECT: Segregation of White and Colored Passengers in Dining Cars.

To: Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

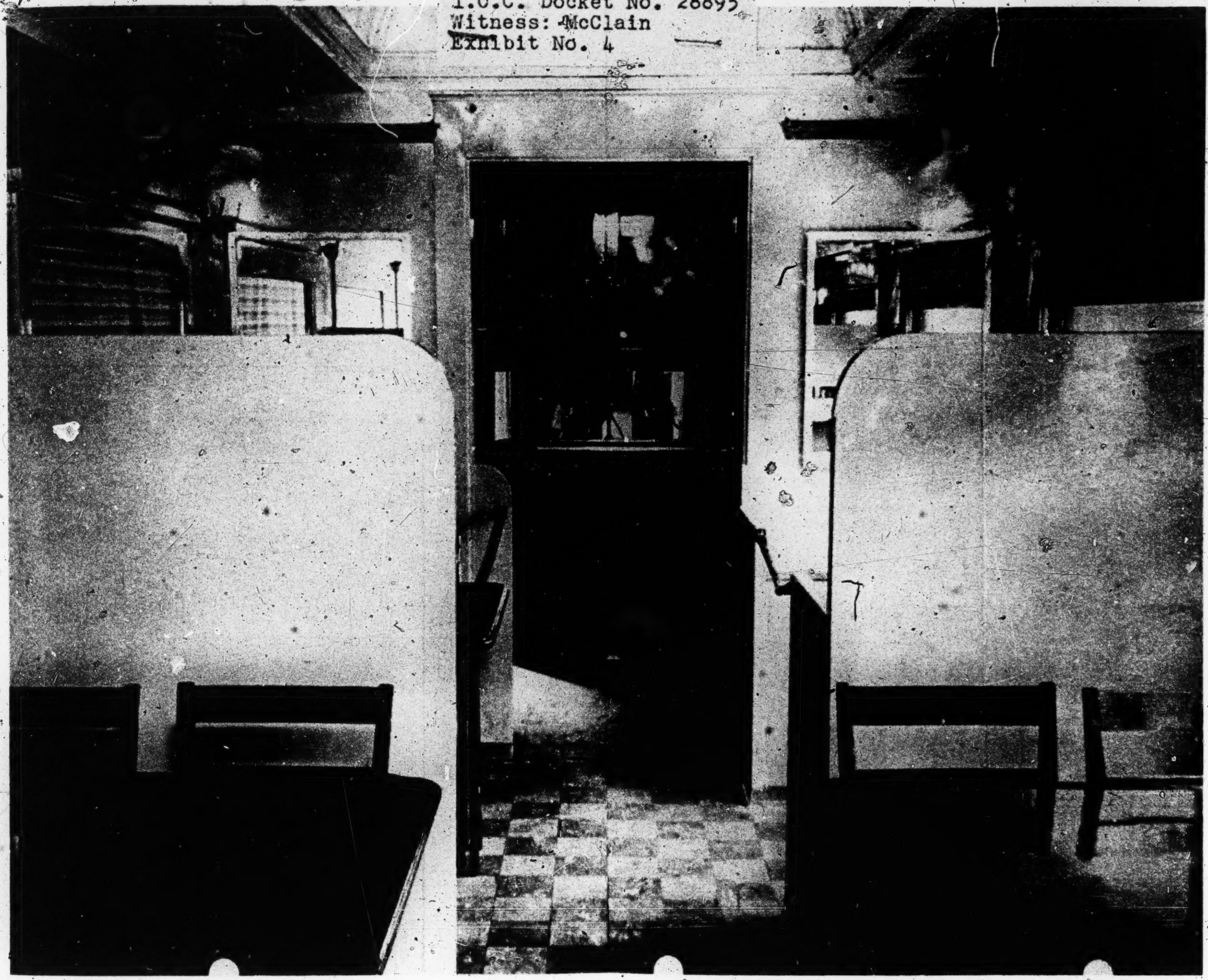
(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946.

R. K. McClain, Assistant Vice-President.

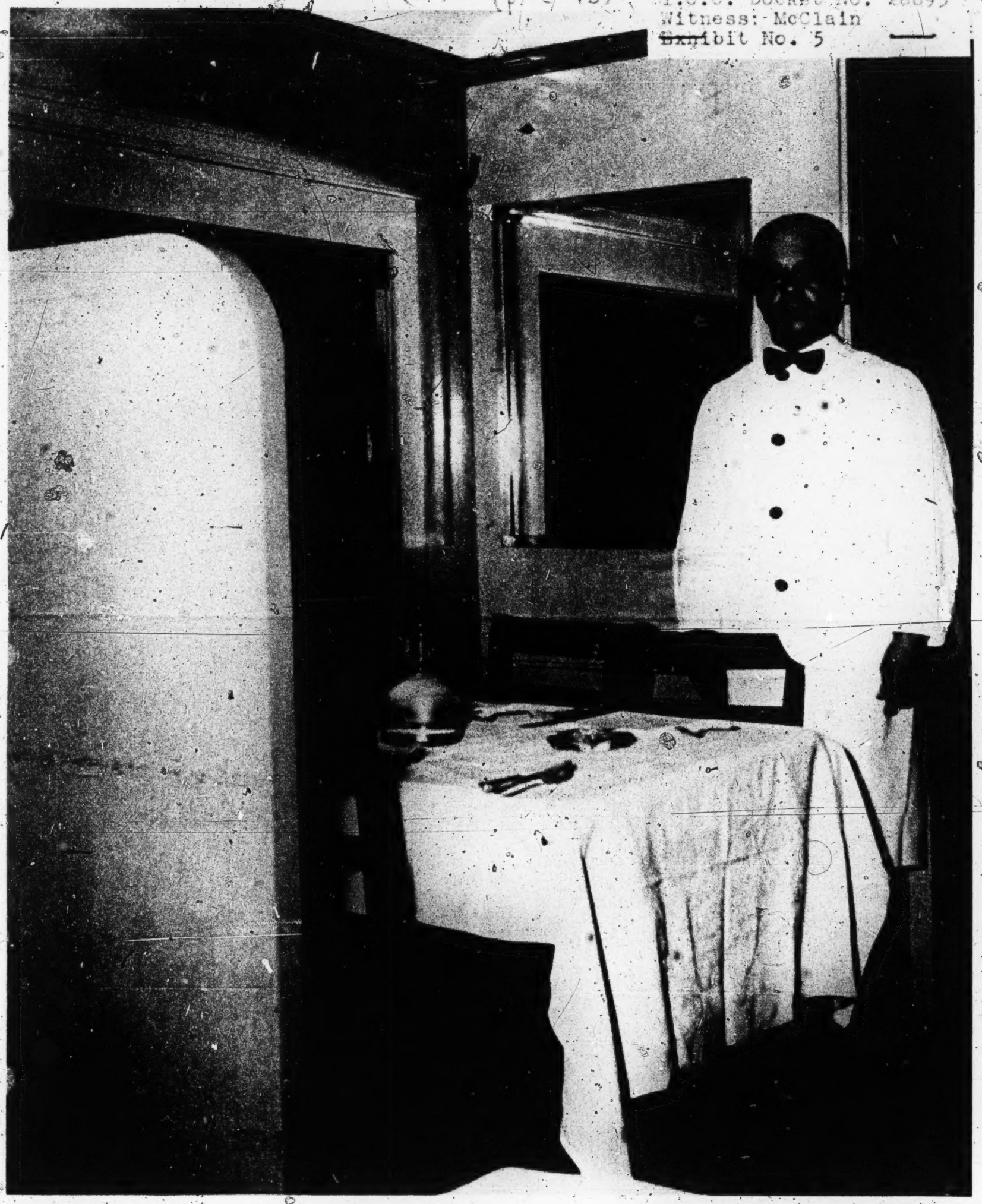
(Here follow 4 Photolithographs—side folios 350-353)

I.C.C. Docket No. 28895
Witness: McClain
Exhibit No. 4



(Exh) (P. 2-43)

I.C.C. Docket NO. 28899
Witness:-McClain
~~Exhibit~~ No. 5

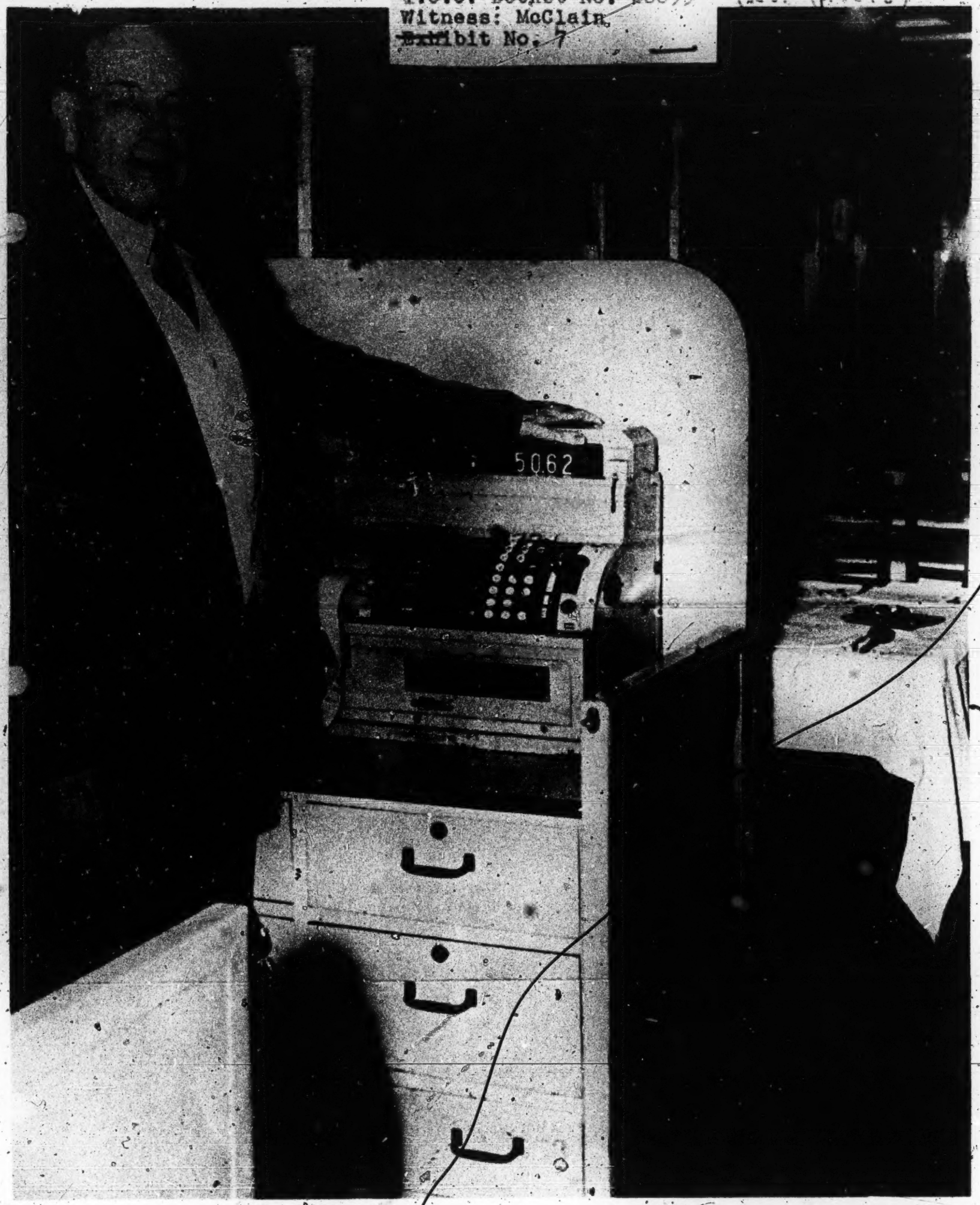


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I.C.C. Docket No. 28895
Witness:McClain
Exhibit No. 6



I.C.C. Docket No. 28895 (353) (P.224D)
Witness: McClain
~~Exhibit~~ No. 7



353

[fol. 354]

I. C. C. Docket No. 28895

Witness: Thomas

EXHIBIT No. 8

Statement of Meals Served to All Passengers and Meals Served to Negro Passengers, Military and Civilian, in Southern Railway Dining Cars on Southern's Passenger Trains Between Washington, D. C. and Atlanta, Georgia for 11 Days, May 14–24, 1945 Inclusive.

				Negroes			Total All Meals Served
	Diner	Trains	Meals	Military	Civilian	Total	
May 14	17	16	31	93	63	156	2,913
" 15	18	18	32	71	47	118	3,901
" 16	18	17	33	55	34	89	3,669
" 17	18	17	33	80	39	119	3,300
" 18	18	17	33	60	35	95	3,310
" 19	18	17	33	72	44	116	3,485
" 20	18	17	33	50	51	101	3,123
" 21	18	17	33	68	35	103	3,265
" 22	18	17	33	52	30	82	3,591
" 23	18	17	33	40	44	84	3,539
" 24	18	17	33	65	24	89	3,519
Totals	196	187	360	706	446	1,152	37,615

Total meals served 11 days..... 37,615
Total meals served to negroes..... 1,152=3.06% of whole
Total meals served to negro civilians..... 446=1.19% " "
Total meals served to negro military..... 706=1.88% " "

[fol. 355]

Meals Between Washington and Atlanta, May 14, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	2	2	4	251
3302	47	B	0	4	4	204
3158	37	B	2	3	5	79
3170	38	L	1	1	2	92
3159	1/33	B	6	2	8	141
"	"	L	6	3	9	102
"	"	D	0	2	2	87
3162	30	D	2	0	2	69
3168	36	B	0	2	2	139
"	36	L	0	4	4	78
"	"	D	4	2	6	102
3146	1/34	B	2	2	4	58
"	"	L	4	3	7	66
"	"	D	6	4	10	109
3148	2/33	B	4	3	7	49
"	"	L	2	1	3	24
"	"	D	4	1	5	28
3163	40/19	L	0	4	4	56
"	"	D	0	2	2	113
3155	29	B	7	6	13	145
"	"	L	5	4	9	85
3156	2/34	B	10	1	11	61
"	"	L	3	2	5	57
"	"	D	0	0	0	110
3164	31	D	6	0	6	58
3140	39	B	0	0	0	46
3153	35	L	4	0	4	39
"	"	D	2	1	3	129
3169	"	L	5	1	6	76
"	"	D	3	1	4	181
3157	30	B	4	2	6	79
17	16	31	93	63	156	2,913

[fol. 356]

Meals Between Washington and Atlanta, May 15, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	0	0	0	202
3302	48	D	0	3	3	172
3301	48	B	3	0	3	229
3166	37	B	2	4	6	115
3167	38	L	1	0	1	106
"	"	D	4	0	4	196
3154	30	D	4	3	7	77
3162	36	B	5	2	7	175
"	"	L	3	1	4	147
"	"	D	0	1	1	130
3168	1/33	B	0	1	1	100
"	"	L	4	4	8	77
"	"	D	1	2	3	67
3146	2/33	B	3	1	4	98
"	"	L	2	3	5	101
"	"	D	4	2	6	53
3148	1/34	B	0	0	0	70
"	"	L	1	1	2	111
"	"	D	1	1	2	138
3163	40	L	2	2	4	68
"	"	D	3	4	7	109
3155	2/34	L	6	1	7	83
3164	29	B	4	0	4	213
"	"	L	2	2	4	148
"	"	D	4	1	5	167
3156	31	D	2	2	4	54
3153	30	B	3	4	7	100
"	"	L	4	1	5	105
3157	35	D	3	1	4	185
3169	35	L	0	0	0	118
"	"	D	0	0	0	138
3142	39	B	0	0	0	49
18	18	32	71	47	118	3,901

[fol. 357]

Meals Between Washington and Atlanta, May 16, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	D	0	0	0	186
3301	47	B	1	2	3	216
3302	48	B	2	1	3	222
3158	38	L	4	1	5	104
"	"	D	0	0	0	183
3170	37	B	3	2	5	120
3154	36	B	1	2	3	134
"	"	L	1	0	1	89
"	"	D	1	2	3	68
3159	30	D	2	1	3	62
3162	1/33	B	2	1	3	99
"	"	L	0	2	2	71
"	"	D	3	3	6	69
3146	1/34	B	1	3	4	70
"	"	L	4	2	6	76
"	"	D	0	0	0	154
3148	2/33	B	2	1	3	134
"	"	L	3	1	4	95
"	"	D	0	1	1	69
3163	40	L	4	2	6	46
"	"	D	1	1	2	57
3155	31	D	2	1	3	58
3156	29	L	2	1	3	179
"	"	D	1	1	2	184
3164	2/34	B	2	1	3	135
"	"	L	3	0	3	144
3164	"	D	0	1	1	161
3153	35	L	0	0	0	38
"	"	D	2	1	3	104
3157	35	L	2	0	2	.71
"	"	D	1	0	1	152
3169	30	B	3	0	3	81
3140	39	B	2	0	2	38
18	17	33	55	34	89	3,669

[fol. 358]

Meals Between Washington and Atlanta, May 17, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	4	3	7	226
3301	48	D	3	0	3	183
3302	47	B	3	0	3	205
3166	38	L	1	2	3	107
"	"	D	0	1	1	173
3167	37	B	3	4	7	127
3154	1/33	B	2	2	4	100
"	1/33	L	2	4	6	65
"	1/33	D	1	0	1	56
3159	36	B	1	0	1	180
"	"	L	1	1	2	118
"	"	D	3	1	4	111
3168	30	D	2	0	2	63
3146	2/33	B	2	0	2	87
"	"	L	1	0	1	67
"	"	D	0	0	0	50
3148	1/34	B	4	0	4	45
"	"	L	6	0	6	57
"	"	D	8	0	8	117
3163	40	L	2	0	2	48
"	"	D	4	0	4	78
3155	29	L	0	2	2	98
"	"	D	1	2	3	95
3156	2/34	B	1	0	1	144
"	"	L	2	4	6	126
"	"	D	4	2	6	131
3164	31	D	2	1	3	44
3153	35	L	6	2	8	60
"	"	D	2	1	3	116
3169	35	L	3	1	4	29
"	"	D	2	3	5	81
3157	31	B	4	2	6	72
3142	39	B	0	1	1	51
18	17	33	80	39	119	3,300

[fol. 359]

Meals Between Washington and Atlanta, May 18, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	2	1	3	226
3301	48	B	4	0	4	234
3302	48	D	2	0	2	173
3158	37	B	1	6	7	97
3170	38	L	1	3	4	114
"	"	D	3	0	3	199
3150	1/33	B	2	0	2	104
"	"	L	3	2	5	62
"	"	D	1	2	3	78
3162	30	D	1	2	3	57
3168	36	B	4	0	4	178
"	"	L	2	0	2	102
"	"	D	3	2	5	88
3146	1/34	B	1	0	1	80
"	"	L	0	0	0	27
"	"	D	0	2	2	125
3148	2/33	B	6	0	6	86
"	"	L	2	0	2	56
"	"	D	1	0	1	30
3163	40	L	1	0	1	51
"	"	D	0	0	0	69
3155	2/34	B	4	0	4	98
"	"	L	2	0	2	95
"	"	D	4	2	6	154
3156	31	D	0	3	3	89
3164	29	B	1	2	3	233
"	"	L	1	1	2	99
3153	30	B	2	1	3	43
3157	35	L	4	1	5	19
"	"	D	1	2	3	46
3169	"	L	0	1	1	54
"	"	D	1	2	3	85
3140	39	B	0	0	0	59
18	17	33	60	35	95	3,310

[fol. 360]

Meals Between Washington and Atlanta, May 19, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	D	0	0	0	176
3301	47	B	0	0	0	195
3302	48	B	2	0	2	234
3166	37	B	3	1	4	132
3167	38	L	4	2	6	125
"	"	D	2	4	6	201
3154	30	D	4	2	6	77
3162	36	B	3	0	3	178
"	"	L	1	0	1	132
"	"	D	1	2	3	79
3168	1/33	B	2	1	3	97
"	"	L	1	1	2	74
"	"	D	2	4	6	46
3146	2/33	B	3	0	3	78
"	"	L	4	2	6	65
"	"	D	1	2	3	60
3148	1/34	B	2	0	2	31
"	"	L	2	0	2	61
"	"	D	1	0	1	81
3163	40	L	5	4	9	68
"	"	D	2	2	4	94
3155	31	D	3	1	4	75
3156	29	B	1	4	5	191
"	"	L	1	2	3	116
3164	2/34	B	3	0	3	71
"	"	L	2	1	3	85
"	"	D	2	1	3	120
3153	35	L	1	0	1	89
"	"	D	3	2	5	129
3157	35	L	4	4	8	71
"	"	D	2	2	4	101
3169	30	B	2	0	2	80
3142	39	B	3	0	3	73
18	17	33	72	44	116	3,485

[fol. 361]

Meals Between Washington and Atlanta, May 20, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	4	0	4	230
3301	47	B	0	0	0	59
3302	48	D	0	0	0	116
3158	38	L	0	0	0	118
"	"	D	1	0	1	176
3170	37	B	2	0	2	139
3154	36	B	3	4	7	221
"	"	L	2	1	3	131
"	"	D	3	3	6	84
3159	30	D	1	2	3	60
3162	1/33	B	4	2	6	96
"	"	L	2	2	4	73
"	"	D	3	4	7	59
3146	1/34	B	2	1	3	71
"	"	L	2	1	3	40
"	"	D	1	1	2	92
3148	2/33	B	2	3	5	98
"	"	L	4	2	6	60
"	"	D	0	2	2	45
3163	40	L	0	1	1	59
"	"	D	2	1	3	103
3155	29	B	1	2	3	212
"	"	L	0	4	4	93
3156	2/34	B	0	2	2	106
"	"	L	0	0	0	70
"	"	D	0	2	2	112
3164	31	D	1	0	1	46
3153	35	L	2	3	5	51
"	"	D	2	0	2	75
3169	35	L	2	0	2	28
"	"	D	2	3	5	59
3157	30	B	2	3	5	79
3140	39	B	0	0	0	62
18	17	33	50	51	101	3,123

[fol. 362]

Meals Between Washington and Atlanta, May 21, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	0	0	0	198
3301	48	B	10	2	12	243
3302	48	D	0	0	0	170
3166	37	B	0	2	2	102
3167	38	L	2	1	3	106
"	"	D	4	3	7	98
3154	1/33	B	1	2	3	127
"	"	L	1	2	3	93
"	"	D	4	4	8	61
3159	56	B	3	0	3	136
"	"	L	2	2	4	104
"	"	D	4	2	6	65
3168	30	D	1	1	2	148
3146	2/33	B	1	1	2	37
"	"	L	0	0	0	51
"	"	D	1	0	1	63
3148	1/34	B	0	0	0	32
"	"	L	0	3	3	46
"	"	D	2	2	4	80
3163	40	L	2	0	2	48
"	"	D	4	0	4	94
3156	31	D	2	0	2	48
3164	29	B	4	1	5	138
"	"	D	2	1	3	70
3155	2/34	B	3	4	7	108
"	"	L	1	2	3	118
"	"	D	4	0	4	156
3153	35	L	2	0	2	114
"	"	D	2	0	2	134
3157	35	L	2	0	2	20
"	"	D	0	0	0	103
3169	30	B	4	0	4	110
3142	39	B	0	0	0	44
18	17	33	68	35	103	3,265

[fol. 363]

Meals Between Washington and Atlanta, May 22, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	D	0	1	1	169
3301	47	B	0	0	0	225
3302	48	B	0	0	0	217
3158	37	B	2	4	6	126
3170	38	L	2	6	8	114
3170	38	D	2	0	2	163
3159	1/33	B	2	0	2	136
3159	1/33	L	1	2	3	104
3159	1/33	D	1	1	2	65
3162	30	D	0	0	0	90
3168	36	B	2	2	4	179
3168	36	L	4	1	5	114
3168	36	D	2	0	2	87
3146	1/34	B	2	0	2	18
3146	1/34	L	4	2	6	36
3146	1/34	D	4	2	6	117
3148	2/33	B	2	0	2	85
3148	2/33	L	1	0	1	58
3148	2/33	D	1	1	2	46
3163	40	L	0	1	1	103
3163	40	D	1	0	1	133
3155	31	D	1	0	1	65
3156	29	B	3	0	3	190
3156	29	L	0	0	0	136
3164	2/34	B	2	1	3	156
3164	2/34	L	0	2	2	72
3164	2/34	D	0	0	0	138
3153	35	L	4	2	6	21
3153	35	D	2	0	2	59
3157	35	L	2	2	4	56
3157	35	D	4	0	4	118
3169	30	B	1	0	1	129
3140	39	B	0	0	0	66
18	17	33	52	30	82	3,591

[fol. 364]

Meals Between Washington and Atlanta, May 23, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	48	B	0	0	0	235
3301	48	D	0	0	0	183
3302	47	B	4	4	8	210
3158	38	L	2	0	2	157
3158	38	D	2	0	2	157
3166	37	B	1	4	0	100
3159	30	D	1	1	2	60
3162	36	B	2	1	3	200
3162	36	L	2	2	4	165
3162	36	D	4	2	6	115
3168	1/33	B	0	2	2	82
3168	1/33	L	0	4	4	83
3168	1/33	D	2	3	5	41
3146	2/33	B	1	2	3	96
3146	2/33	L	1	1	2	56
3146	2/33	D	1	4	5	58
3148	1/34	B	3	1	4	99
3148	1/34	L	2	1	3	103
3148	1/34	D	2	2	4	152
3163	40	L	0	2	2	99
3163	40	D	0	1	1	148
3155	29	B	1	1	2	181
3155	29	L	1	0	1	110
3156	2/34	B	0	0	0	62
3156	2/34	L	0	2	2	58
3156	2/34	D	0	0	0	67
3164	31	D	0	0	0	50
3153	35	L	1	0	1	60
3153	35	D	1	0	1	126
3169	35	L	2	0	2	25
3169	35	D	2	2	4	68
3157	30	B	2	2	4	93
3142	39	B	0	0	0	40
18	17	33	40	44	84	3,539

[fol. 365]

Meals Between Washington and Atlanta, May 24, 1945

Diner	Train	Meal	Colored Passengers Served			Total All Meals Served
			Military	Civilian	Total	
3300	47	B	4	4	8	209
3301	48	B	0	0	0	246
3302	48	D	0	0	0	184
3166	38	L	1	2	3	125
3166	38	D	1	2	3	197
3170	37	B	2	0	2	101
3154	30	D	2	0	2	84
3159	36	B	0	0	0	258
3159	36	L	2	2	4	94
3159	36	D	4	1	5	101
3162	1/33	B	2	1	3	113
3162	1/33	L	1	1	2	90
3162	1/33	D	1	1	2	75
3146	1/34	B	3	0	3	86
3146	1/34	L	2	0	2	68
3146	1/34	D	2	2	4	110
2148	2/33	B	2	0	2	59
3148	2/33	L	2	0	2	56
3148	2/33	D	4	0	4	47
3163	40	L	2	0	2	65
3163	40	D	2	0	2	119
3155	2/34	B	2	0	2	96
3155	2/34	L	1	0	1	88
3155	2/34	D	1	0	1	112
3156	31	D	2	0	2	47
3164	29	B	0	0	0	201
3164	29	L	0	0	0	75
3153	30	B	4	0	4	67
3157	35	L	6	0	6	27
3157	35	D	4	0	4	90
3169	35	L	0	2	2	85
3169	35	D	4	4	8	101
3140	39	B	2	2	4	43
18	17	33	65	24	89	3,519

[fol. 366]

I.C.C. Docket No. 28895
Witness: Thomas
EXHIBIT No. 9

Statement Showing Number of White and Colored Passengers Served Between Atlanta, Ga., and Washington, D. C., During Period Oct. 1–10, Inc., 1946

Date	Number Meals Served			
	Military Colored	Civilian Colored	White	Total
Oct. 1	14	75	2,249	2,338
2	35	88	1,990	2,113
3	26	103	1,898	2,027
4	12	58	2,060	2,130
5	14	67	2,561	2,642
6	17	67	2,322	2,406
7	2	57	1,797	1,856
8	14	83	1,742	1,839
9	9	72	1,633	1,714
10	6	53	1,665	1,724
Total	149	723	19,917	20,789

	Percent.
Military Colored	.72
Civilian Colored	3.48
White	95.80
Total	100.00

[fol. 367]

Colored and White Passengers Served Between Washington and Atlanta
October 1, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	4	4	206
3300	47	B	0	0	0	156
3166	37	D	0	0	0	132
3167	37	B	0	1	1	128
3170	38	L	0	0	0	61
3170	38	D	0	0	0	133
3154	34	B	0	4	4	96
3154	34	L	0	10	10	107
3154	34	D	0	12	12	138
3157	33	B	0	1	1	152
3157	33	L	0	3	3	85
3157	33	D	0	0	0	85
3163	40	L	0	0	0	35
3163	40	D	0	0	0	52
3153	29	B	1	13	14	126
3153	29	L	0	3	3	131
3156	35	L	0	1	1	19
3156	35	D	0	6	6	57
3155	36	B	4	0	4	80
3155	36	L	2	4	6	32
3155	36	D	2	2	4	20
3159	17	D	0	2	2	46
3168	18	L	0	0	0	14
3168	31	D	0	1	1	68
3158	30	B	5	7	12	36
3158	30	L	0	0	0	11
3140	39	B	0	1	1	43
Totals			14	75	89	2,249

[fol. 368]

Colored and White Passengers Served Between Washington and Atlanta
October 2, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3301	48	B	0	10	10	225
3302	47	B	0	8	8	147
3170	37	D	0	0	0	117
3166	37	B	0	0	0	69
3167	38	L	0	0	0	51
3167	38	D	0	0	0	132
3160	34	B	2	1	3	76
3160	34	L	2	0	2	71
3160	34	D	0	1	1	119
3154	33	B	0	11	11	104
3154	33	L	0	4	4	76
3154	33	D	0	2	2	46
3162	40	L	0	8	8	32
3162	40	D	0	6	6	81
3163	29	B	5	8	13	130
3163	29	L	1	1	2	60
3164	35	L	4	6	10	27
3164	35	D	2	6	8	87
3156	36	B	4	2	6	60
3156	36	L	4	0	4	39
3156	36	D	5	1	6	20
3158	17	D	2	7	9	29
3159	18	L	0	1	1	15
3159	31	D	0	0	0	68
3168	30	B	4	5	9	58
3168	30	L	0	0	0	11
3142	39	B	0	0	0	40
Totals			35	88	123	1,990

[fol. 369]

Colored and White Passengers Served Between Washington and Atlanta
October 3, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3300	48	B	0	9	9	187
3301	47	B	0	6	6	152
3167	37	D	0	0	0	140
3170	37	B	0	0	0	67
3166	38	L	0	1	1	62
3166	38	D	0	2	2	149
3157	34	B	2	1	3	72
3157	34	L	2	2	4	81
3157	34	D	2	2	4	110
3160	33	B	1	17	18	98
3160	33	L	1	13	14	63
3160	33	D	0	5	5	24
3153	40	L	2	2	4	23
3153	40	D	0	2	2	57
3162	29	B	0	8	8	98
3162	29	L	0	8	8	67
3155	35	L	0	1	1	21
3155	35	D	0	3	3	64
3164	36	B	3	1	4	46
3164	36	L	0	4	4	31
3164	36	D	1	0	1	24
3168	17	D	9	3	12	46
3158	18	L	0	0	0	17
3158	31	D	1	2	3	78
3159	30	B	2	5	7	56
3159	30	L	0	3	3	36
3140	39	B	0	3	3	29
Totals.....			26	103	129	1,898

[fol. 370]

Colored and White Passengers Served Between Washington and Atlanta
October 4, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	7	7	208
3300	47	B	0	5	5	159
3166	37	D	0	0	0	130
3167	37	B	0	0	0	73
3170	38	D	0	0	0	89
3154	34	B	0	4	4	64
3154	34	L	0	5	5	67
3154	34	D	0	8	8	145
3157	33	B	0	2	2	137
3157	33	L	0	3	3	95
3157	33	D	0	0	0	79
3163	40	L	0	0	0	23
3163	40	D	2	0	2	47
3153	29	B	1	5	6	107
3153	29	L	1	0	1	53
3156	35	L	1	0	1	21
3156	35	D	0	8	8	54
3155	36	B	2	2	4	80
3155	36	L	4	0	4	56
3155	36	D	1	4	5	43
3159	17	D	0	0	0	96
3168	18	L	0	0	0	42
3168	31	D	0	1	1	104
3158	30	B	0	0	0	33
3158	30	L	0	0	0	16
3142	39	B	0	4	4	39
Totals			12	58	70	2,060
3170	38	L		No Service		

[fol. 371]

Colored and White Passengers Served Between Washington and Atlanta
October 5, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3301	48	B	0	0	0	215
3302	47	B	0	3	3	211
3170	37	D	0	0	0	118
3166	37	B	0	0	0	67
3167	38	L	0	0	0	96
3167	38	D	0	0	0	137
3160	34	B	1	1	2	101
3160	34	L	1	0	1	122
3160	34	D	0	1	1	155
3154	33	B	0	12	12	185
3154	33	L	0	9	9	109
3154	33	D	0	0	0	52
3162	40	L	1	11	12	188
3162	40	D	1	9	10	162
3163	29	B	3	4	7	134
3163	29	L	0	1	1	46
3164	35	L	0	1	1	26
3164	35	D	3	2	5	61
3156	36	B	2	3	5	32
3156	36	L	0	2	2	30
3156	36	D	0	0	0	23
3158	17	D	0	0	0	59
3159	18	L	0	0	0	32
3159	31	D	0	1	1	86
3168	30	B	2	4	6	49
3168	30	L	0	0	0	21
3140	39	B	0	3	3	44
Totals			14	67	81	2,561

[fol. 372]

Colored and White Passengers Served Between Washington and Atlanta
October 6, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	0	0	206
3300	47	B	0	8	8	196
3167	37	D	0	0	0	149
3170	37	B	0	11	11	80
3166	38	L	0	0	0	71
3166	38	D	0	0	0	155
3157	34	B	5	2	7	68
3157	34	L	5	2	7	66
3157	34	D	0	1	1	161
3160	33	B	0	2	2	150
3160	33	L	1	0	1	102
3160	33	D	0	3	3	65
3163	40	L	1	0	1	8
3163	40	D	0	3	3	55
3162	29	B	0	8	8	95
3162	29	L	0	3	3	53
3155	35	L	1	4	5	25
3155	35	D	1	4	5	81
3164	36	B	2	2	4	105
3164	36	L	0	2	2	90
3164	36	D	1	1	2	61
3168	17	D	0	1	1	67
3158	18	L	0	0	0	18
3158	31	D	0	2	2	82
3159	30	B	0	7	7	53
3159	30	L	0	1	1	21
3142	39	B	0	0	0	39
Totals.....			17	67	84	2,322

[fol. 373]

Colored and White Passengers Served Between Washington and Atlanta
October 7, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	0	9	9	211
3300	47	B	0	7	7	155
3166	37	D	0	0	0	137
3167	37	B	0	0	0	93
3170	38	L	0	0	0	46
3170	38	D	0	1	1	122
3154	34	B	0	1	1	42
3154	34	L	0	1	1	44
3154	34	D	0	10	10	106
3157	33	B	0	2	2	93
3157	33	L	0	2	2	43
3157	33	D	0	0	0	26
3153	40	L	0	0	0	48
3153	40	D	0	2	2	101
3163	29	B	1	5	6	99
3163	29	L	1	1	2	24
3156	35	L	0	1	1	20
3156	35	D	0	2	2	43
3155	36	B	0	1	1	84
3155	36	L	0	5	5	53
3155	36	D	0	3	3	43
3159	17	D	0	4	4	48
3168	18	L	0	0	0	7
3168	31	D	0	0	0	50
3158	30	B	0	0	0	19
3158	30	L	No Service			
3140	39	B	0	0	0	40
Totals.....			21	57	59	1,797

[fol. 374]

Colored and White Passengers Served Between Washington and Atlanta
October 8, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3301	48	B	0	4	4	157
3302	47	B	0	11	11	149
3170	37	D	0	0	0	115
3166	37	B	0	0	0	72
3167	38	L	0	0	0	66
3167	38	D	0	0	0	169
3160	34	B	2	3	5	51
3160	34	L	1	2	3	62
3160	34	D	3	6	9	87
3154	33	B	0	12	12	99
3154	33	L	0	5	5	66
3154	33	D	0	0	0	33
3162	40	L	0	5	5	13
3162	40	D	0	3	3	56
3153	29	B	0	2	2	101
3153	29	L	0	0	0	50
3164	35	L	0	0	0	24
3164	35	D	0	0	0	54
3156	36	B	1	0	1	51
3156	36	L	1	0	1	42
3156	36	D	0	2	2	40
3158	17	D	1	2	3	56
3159	18	L	0	5	5	3
3159	31	D	3	10	13	76
3168	30	B	1	7	8	18
3168	30	L	1	4	5	2
3142	39	B	0	0	0	30
Totals			14	83	97	1,742

[fol. 375]

Colored and White Passengers Served Between Washington and Atlanta
October 9, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3300	48	B	0	11	11	157
3301	47	B	0	5	5	158
3167	37	D	0	0	0	119
3170	37	B	0	0	0	61
3166	38	L	0	3	3	80
3166	38	D	0	3	3	100
3157	34	B	0	0	0	69
3157	34	L	0	4	4	53
3157	34	D	0	4	4	105
3160	33	B	3	4	7	79
3160	33	L	0	1	1	56
3160	33	D	0	0	0	17
3163	40	L	0	3	3	14
3163	40	D	0	3	3	46
3162	29	B	0	10	10	89
3162	29	L	0	4	4	28
3155	35	L	0	3	3	18
3155	35	D	0	6	6	38
3164	36	B	2	2	4	61
3164	36	L	0	0	0	23
3164	36	D	0	0	0	18
3168	17	D	1	1	2	45
3158	18	L	1	1	2	28
3158	31	D	0	0	0	75
3159	30	B	1	0	1	36
3159	30	L	1	3	4	18
3140	39	B	0	1	1	42
Totals.....			9	72	81	1,633

[fol. 376]

Colored and White Passengers Served Between Washington and Atlanta
October 10, 1946

Diner	Train	Meal	Military Colored	Civilian Colored	Total	White
3302	48	B	1	4	5	145
3300	47	B	0	4	4	114
3166	37	D	0	6	6	186
3167	37	B	0	0	0	49
3170	38	L	0	0	0	60
3170	38	D	0	1	1	61
3154	34	B	0	3	3	53
3154	34	L	0	4	4	43
3154	34	D	0	2	2	97
3157	33	B	0	0	0	100
3157	33	L	0	0	0	90
3157	33	D	0	0	0	60
3153	40	L	0	1	1	14
3153	40	D	0	1	1	36
3163	29	B	0	6	6	105
3163	29	L	0	0	0	33
3156	35	L	0	0	0	38
3156	35	D	0	10	10	68
3155	36	B	2	4	6	42
3155	36	L	2	1	3	36
3155	36	D	0	0	0	31
3159	17	D	0	0	0	52
3168	18	L	0	0	0	20
3168	31	D	1	1	2	63
3158	30	B	0	4	4	31
3158	30	L	No Service			
3142	39	B	0	1	1	38
Totals			6	53	59	1,665

[fol. 377] IN DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MARYLAND

Civil No. 3829

Argued June 4th, 1948. Decided September 25, 1948.

ELMER W. HENDERSON, Plaintiff,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, Defendants

Lawson, McKenzie & Windsor (B. V. Lawson, Jr., of Washington, D. C.; Josiah F. Henry, Jr., of Baltimore), for plaintiff.

Daniel W. Knowlton and Allen Crenshaw for Interstate Commerce Commission.

Bernard J. Flynn, United States Attorney, and Charles Clark and A. J. Dixon, of Washington, D. C., for Southern Railway Co.

Before Soper, Circuit Judge, and Coleman and Chesnut, District Judges.

Order of Interstate Commerce Commission—Dining Car Service Afforded Negro Passengers on The Southern Railway—Alleged Discrimination—Complaint Dismissed.

OPINION—Filed September 25, 1948

COLEMAN, District Judge.

This suit is brought by the plaintiff, under the provisions of 28 U. S. C. A. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), to set aside an order of the Interstate Commerce Commission entered on September 5th, 1947. The contested order involves dining car service afforded Negro passengers on the Southern Railway. This is the second time that the present plaintiff has litigated the question before the Commission and this Court. The Southern Railway asked for, and was granted leave to intervene as a party defendant, it having been the sole defendant in the proceeding before the Commission which resulted in the issuance of the order which plaintiff now seeks to annul.

The facts involved in the prior proceeding, before both the Commission and this Court, which led up to the present suit may be summarized as follows: On October 10th, 1942,

the plaintiff, a Negro, filed a complaint with the Interstate Commerce Commission alleging that on May 17th, 1942, while traveling as a first class passenger on the Southern Railway from Washington, D. C. to Atlanta, Georgia, that [fol. 378] Railway subjected him to undue and unreasonable prejudice and disadvantage, in derogation of his rights under the Federal Constitution and the Interstate Commerce Act, (1) by providing insufficient tables and service for Negroes in its dining car; (2) by the use of a curtain around the tables allegedly reserved for Negroes; and (3) by giving preference and advantage to white persons, in that it failed and refused to serve plaintiff at tables in its dining car where there were empty seats, these tables and seats, although allegedly reserved for Negroes, being allowed to be used by white persons. The Commission was asked to require defendant to desist from such discrimination and in the future, to establish for the transportation of Negro interstate passengers over its lines equal and just dining car facilities, and such other services and facilities as the Commission might consider reasonable and just. Plaintiff also asked for damages by reason of the alleged discrimination.

After due hearing, on May 13th, 1944, Division No. 2 of the Commission rendered its report (258 I. C. C. 413) in which it found that while plaintiff had been subjected to undue and unreasonable prejudice and disadvantage, it, nevertheless, found that there was no basis for an award of damages by way of reparation, or necessity for an order for the future. The Commission said (258 I. C. C. 419): "As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee (The dining car Steward) of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining car service.

"• • • As defendant's present instructions to its em- [fol. 379] ployees seem adequate, the entry of an order for the future in this respect would serve no useful purpose." Accordingly, the Commission dismissed the complaint.

On appeal to this Court to set aside the action of the Commission, we held (Henderson vs. United States, 63 F. Supp. 906) that while racial segregation of interstate passengers is not per se forbidden either by the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, the Commission, nevertheless, erred in holding that the Southern Railways's general practice, as evidenced by its then current dining car regulations or instructions, would result in no substantial inequality of treatment between Negro and other passengers seeking dining car service. We so found for the reasons as stated in our detailed opinion, as follows (63 F. Supp. 906 at 915-916): "In the case of the white passenger, he is merely required (by the Railways's dining car regulations) to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionally reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eyes of the law requires. None of the methods of segregation have been employed which have heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of a car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

"We accept the Commission's construction of the supplemental regulation and its finding that the general practice [fol. 380] thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But, nevertheless, in our opinion the regulation so construed, applied and practised, does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the segregation of white and colored passengers; nor do we think it unreasonable, in view of the recently

prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers or, if none there, elsewhere in the dining car.

"The analogy of the Mitchell case is very close. There, Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at pages 96, 97, 61 S. Ct. 873, at page 877, 85 L. Ed. 1201): 'It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers [fol. 381] can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.'

* * * * * * * *

'While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.'

"The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner,

and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served on coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again the analogy to the Mitchell case is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches."

With respect to the requirement in the Southern Railway's then current dining car regulations that tables for Negro passengers be curtained, we found that this did not violate the rule of substantial racial equality, and stated that the method of carrying out the principle of racial segregation on interstate carriers was a matter for the Commission to determine. However, for the other reason just stated, by decree entered on February 15th, 1946, this Court set aside the order of the Commission dismissing the complaint, and remanded the case to the Commission for further proceedings "in the light of the principles outlined" in our opinion. As a result, the Southern Railway thereupon issued, effective March 1st, 1946, the following new [fol. 382] instructions for the regulation of its dining car service, canceling the instructions previously in effect:

"Subject: Segregation of White and Colored Passengers In Dining Cars.

To: Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules."

The Commission reopened the proceeding for further hearing; the Southern Railway presented additional evidence, and on September 5th, 1947, the Commission filed a report (two Commissioners dissenting in part) in which it affirmed its prior findings to the effect that whereas complainant had been subjected to undue and unreasonable prejudice and disadvantage on one particular occasion, no basis for an award of damages had been shown, and further found that the new dining car regulations established by [fol. 383] defendant, effective March 1st, 1946, and currently in force, which we have above quoted, were not in violation of Section 3 or any other provision of the Interstate Commerce Act. Accordingly, the Commission refused to enter an order for the future, and dismissed the complaint, whereupon the present suit was brought seeking to annul this latest action on the part of the Commission.

It will thus be seen that the precise question presented for decision is whether the Interstate Commerce Commission, by this second report and order, has fully complied with the direction given to it by this Court when we reversed the earlier action of the Commission, dismissing the complaint and remanded the proceeding to the Commission "for further proceedings in the light of the principles" set forth in our opinion.

The sum and substance of the Commission's position is that the same facts and issues are involved in this proceeding as in the previous one, with the exception of the Southern Railway's amended dining car regulations; that these amended regulations promulgated by the Railway as a result of our prior ruling, have removed the discrimination found by this Court to have been latent in the Railway's previous regulations, namely, that the Railway now provides adequately and reasonably for the equality of service and treatment of Negroes and whites as required by our decision. We quote the following from the Commission's report (269 I.C.C. 73 at —): "The current regulations were designed by the defendant to meet the Court's criticisms of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has

abolished its former practice, condemned by the court, of permitting white patrons to be seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for members of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no [fol. 384] circumstances are white passengers served in such space; nor are colored passengers served elsewhere in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

"Concerning the adequacy of the space reserved for Negro passengers, defendant's Superintendent of Dining Cars presented in evidence the results of two tests made under his direction and supervision showing the number of meals served to white and Negro patrons, respectively, in dining cars operated by defendant between Washington, D. C., and Atlanta, Ga. During the 11 days, May 14 to 24, 1945, a total of 37,615 meals were served, of which 446, or 1.19 per cent., were served to Negro civilians and 706, or 1.88 per cent., to Negroes in the military service. Of 20,789 meals served during the first 10 days of October, 1946, 723 or 3.48 per cent. of the total, were served to Negro civilians and 149, or 0.72 per cent., to Negro service people. It is defendant's practice to serve white and Negro soldiers together, without distinction. Under the current regulations setting apart four seats for Negroes, slightly more than 8 per cent. of the seating space in its dining cars is reserved unconditionally for the use of approximately 4 per cent of the patrons. The capacity of the cars, now 48 seats, will be reduced to 44 seats as the offices for stewards are installed. A further fact disclosed by the described tests is that rarely is defendant requested to provide diner service for more than four Negroes at the same meal.

"As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 per cent. during the May, 1945 test period to 3.48 per cent. during the October, 1946, period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us,

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however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division [fol. 385] between the races of its available dining-car space."

With respect to the curtains separating the tables reserved for Negroes from the other tables, the Commission in its report said (269 I. C. C. 73 at): "At the time of the further hearing, the defendant had removed the curtains from one of its dining cars and had constructed in their stead permanent wood partitions approximately 5 feet high extending from the sides of the car to the aisle. The table which formerly occupied the space opposite the one now reserved exclusively for colored passengers, as described in rule (1) of the foregoing regulations, has been removed and the space is utilized as an office for the steward. That position affords the best view of the entire car, including the entrance to the kitchen and pantry and from it the steward can best supervise the service. As its dining cars are sent to the shops for repairs in the future, it is defendants's intention to make similar structural changes in all of them.

The case is before us on the testimony presented to the Commission. The correctness of its factual analysis of this testimony as contained in its report is not questioned. Thus, it will be seen that the Railway's amended dining car regulations, contrary to the prior regulations, require the setting aside of a table, seating four persons, exclusively for the use of Negro passengers. Also, the uncontradicted evidence presented to the Commission shows that up to the date of the Commission's decision the number of Negro passengers seeking dining car service rarely if ever exceeded that number on any one trip. Should that happen, however, the situation would be no different from those instances not infrequently occurring in interstate railroad transportation, where more white passengers seek dining car service than can be seated at one time. In short, the new regulations, the Commission found, are designed to take into account, with all due regard to the density of Negro travel requiring dining car service, the probability [fol. 386] that a Negro passenger may not desire a meal as soon as he boards the train, or that he may board the train at an intermediate point after the dining car service

has been begun, and may desire at that time or later to be served in the dining car.

Next, as concerns the matter of curtains separating Negro dining car patrons from the white patrons, in our prior opinion we stated (63 F. Supp. 906 at 916) that "Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine." As above explained, the Railway Company is now in the process of abandoning the use of curtains as a means of separating the tables and, in their stead, is constructing in its dining cars permanent, wooden partitions, approximately five feet high, extending from the side of the car to the aisle. Also, it is removing from all of its dining cars the table which had formerly occupied the space directly opposite the table now exclusively reserved for colored passengers, and this space is being utilized as an office for the dining car steward. As also explained in its report, the Commission, in Mays vs. Southern Railway Company, 268 I. C. C. 352, decided April 8, 1947, had before it this same question, under precisely the same dining car regulations as those now before us, and found that there was no basis for holding this manner of separation of the different tables to be a forbidden discrimination.

We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission [fol. 387] has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the kitchen end of the dining car, directly opposite the space newly provided for the stewards office. The undesirability of this location compared with that of tables in other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, non-existent. Therefore, it necessarily follows that this present complaint

must be dismissed unless the Supreme Court has, in some decision or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation.

We turn then to a consideration of whether any pertinent decisions have been rendered by the Supreme Court subsequent to our earlier decision: We find only two cases, namely, Morgan vs. Virginia, 328 U. S. 373, and Bob-Lo Excursion Co. vs. Michigan, 333 U. S. 28, sufficiently related to invite attention. At the time of our previous opinion the Morgan case had been decided by the Supreme Court of Appeals of Virginia, 184 Va. 24, but the appeal therein to the Supreme Court was still undecided. As pointed out in our previous opinion, that case involved the validity of a Virginia statute and State court action to enforce the same, and did not involve, as does the case here, the validity of the regulations of a common carrier. The Supreme Court reversed the State Court and held unconstitutional, as a burden on interstate commerce, the Virginia statute which required separation of the races in motor buses. This requirement was described by the Supreme Court in its opinion as follows (328 U. S. 373 at 36[illegible]): "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort or convenience of passengers.' This [fol. 388] occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey."

In our consideration of the Morgan case in our earlier opinion, as that case then, stood, we stated (63 F. Supp. 906 at 913-914) that "it is not necessary to approach the present case from this aspect (the fact that Virginia's segregation laws were applicable alike to interstate as well as intrastate rail transportation) because as we have said,

the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decisions; and likewise, the Railway Company does not rely on them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case, because it does not, at least in terms purport to embrace dining car service. * * *'" Then, after quoting the Virginia statute, we said: "Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case because nothing short of race segregation in separate cars, or in compartments 'divided by a good and substantial partition, with a door therein,' would satisfy those provisions."

That the Supreme Court in the Morgan case very definitely recognized the distinction between the two types of cases, namely those involving the validity of a State statute [fol. 389] and those involving the rule of a carrier requiring segregation of interstate passengers, is indicated by the following footnote on page 377 of its opinion: "When passing upon the rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' Chiles vs. Cheasapeake & Ohio R. R. Co., 218 U. S. 71, 75." See also Simmons vs. Atlantic Greyhound Corporation, 75 F. Supp. 166; Stamps vs. Louisville & Nashville Railroad Co., I. C. C.

The Commission in its report now under review, clearly stated, we think the distinction between the two types of cases in the following language (269 I. C. C. 73 at): "Defendant's dining car regulations apply only to service in dining cars which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemn as imposing an undue burden on interstate commerce."

We turn then to the only other case decided by the Supreme Court since our earlier opinion in this proceeding

was rendered, which likewise appears pertinent but actually is not, to the present issue, namely, Bob-Lo Excursion Company vs. Michigan, supra. There, it was decided that a Michigan statute prohibiting Negro segregation in all public service including transportation, was legally enforceable with respect to refusal of a Michigan corporation, engaged chiefly in the round-trip of passengers from Detroit to Bois Blanc Island, Canada, to sell a ticket to a Negro for transportation to the latter resort which was reserved for white people, because, although the Michigan corporation was engaged in foreign commerce, application of the Michigan law to appellant was held not to contravene the commerce clause of the Federal Constitution.

In its opinion in the Bob-Lo Excursion Company Case, the [fol. 390] Supreme Court distinguished Morgan vs. Virginia, supra, and Hall vs. Decuir, 95 U. S. 485, saying (333 U. S. 28 at 39-40): "The regulation of traffic along the Mississippi River, such as the Hall case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here."

The even more recent decisions of the Supreme Court involving deed covenants prohibiting sales of realty to Negroes, Shelley vs. Kraemer, U. S. ; Hurd vs. Hodge, U. S. ; McGhee vs. Sipes, U. S. ; and Uricolo vs. Hodge, U. S., obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden. On the contrary, they recognize the legality of agreements to this effect. They merely hold that such agreements, although lawful, are not enforceable by court process. Thus, they have no relation to the principles governing the conduct of interstate transportation by common carrier.

Reliance is also placed by counsel for plaintiff upon Matthews vs. Southern Railway Company, 157 F. (2d) 609. There, the only issue was the correctness of the trial judge's charge to the jury in a race separation case. The Court of Appeals for the District of Columbia, in a footnote reference to the Morgan case, said (page 610) it could see "no valid distinction between segregation in buses and in railroad cars." We believe that we have already addressed

ourselves sufficiently to this point to indicate that, in our opinion, there *is* a very definite distinction from the aspect of dining car accommodations during railroad transportation.

To summarize and conclude: (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or [fol. 391] any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I. C. C. 73 at): "Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future." To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is *any* empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach,—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, *every* seat in the dining car may be occupied.

For the reasons herein set forth the complaint must be dismissed.

I concur.

W. Calvin Chesnut, U. S. District Judge.

[fol. 392] DISSENTING OPINION

SOPER, Circuit Judge (dissenting):

Insofar as the opinion of the court sustains the Railroad Company's dining car regulations on the ground that they made adequate provision for the number of Negro passengers likely to apply for service, I am constrained to dissent. The Railroad Company has found that less than 4 per cent of its dining car patrons are Negroes, and it reserves 8 per cent of the available space for their exclusive use. This arrangement on its face seems fair to the Negro race, but it is based on the erroneous assumption that the rights which the Fourteenth Amendment is designed to protect are racial rather than personal in their nature. The regulations set aside one table in the dining car exclusively for Negroes and ten tables exclusively for whites, and the result is that occasionally a member of one race is denied service which is then available to a member of the other. Whenever this occurs, the Railroad Company discriminates against one passenger in favor of another because of his race, and deprives him of equality of treatment, and it is no answer to say that the Railroad Company has taken reasonable precautions to prevent the occurrence. It is true that segregation of the races is lawful provided "substantial equality of treatment of persons traveling under like conditions" is accorded; but the right belongs to the individual and not to the race, and segregation must be abandoned, or at least temporarily suspended, whenever its enforcement deprives the individual of treatment equal to that accorded to any other person at the same time.

Segregation in railroad traffic may be maintained if there are sufficient accom-odations for all; but a vacant seat may not be denied to a passenger simply because of his race. The decisions of the Supreme Court support this view. In McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151 (1914), the court upheld an Oklahoma statute which required the Railroad Company to provide separate but equal accom-odations for the two races in intrastate railroad travel, but struck down a section of the Act which permitted the carrier to provide sleeping cars, dining car, or chair cars to be used [fol. 393] exclusively by either white or Negro passengers, separately but not jointly. It is not questioned that the meaning of this provision was that the carrier might provide these cars for white persons but need not provide similar

accom-odations for Negroes, because there were not enough Negroes seeking these accom-odations to warrant the expense of providing them. Justice Hughes, in holding this section unconstitutional, said: (pp. 161-2):

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon their being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

It may be suggested that the McCabe case is distinguishable because in that case the Railroad Company made no provision for colored passengers desiring first class service, whereas the regulations under examination in the present case are designed to care for all colored passengers that may be reasonably expected to apply. The distinction, however, is one of degree and not of principle, for in both cases the arrangement is designed to take care of the demands of the race rather than those of the individual citizen. Moreover, in 1940, the Supreme Court in Mitchell v. United States, 313 U. S. 80, reiterated the ruling that constitutional rights are personal and not racial, in a case where the carrier contemplated the probability that Pullman service would be demanded by Negroes, but made insufficient provision to meet the demand. Whenever that occurred, the court said, the [fol. 394] Railroad Company was required to abandon the policy of segregation and seat the colored passenger in the car ordinarily reserved for whites. It had been the practice of the Railroad Company to accom-odate the occasional Negro applicant for a chair in a Pullman car by giving him a seat in a drawing room at the same rate as was charged for a seat in the body of the car, but to compel the passenger

to take a place in an ordinary coach when no drawing room was available. Adopting the view of the Government which opposed the regulation, Chief Justice Hughes, speaking for the court, said: (pp. 96-7)

"The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accom-odations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accom-odation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accom-odations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.' And the Commission has recognized that inequality persists with respect to certain other facilities such as dining car and observation-parlor car accom-odations.

"We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic.' But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. McCabe v. Atchison T. & S. F. Ry. Co., supra. While the supply of particular [fol. 395] facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. Id. See, also, Missouri, ex rel. Gaines v. Canada, pp. 350, 351 (305 U. S. 337). And the Interstate Commerce Act expressly extends its prohibi-

tion to the subjecting of 'any particular person' to unreasonable discriminations."

The same principle was again approved by the Supreme Court in the recent case of Shelley vs. Kraemer, 68 S. Ct. 836, which dealt with the validity of restrictive covenants in deeds designed to exclude Negroes from the ownership or occupancy of real property. The court held that covenants of this nature are unenforceable and, pointing out that the constitutional rule of equality is personal, declared that the denial of such a right to a Negro is not validated by the denial of the right under like circumstances to a white person. Chief Justice Vinson said: (p. 846)

"Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or Federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts [fol. 396] may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities".

The carrier in the pending case has undoubtedly made an earnest effort to meet the criticisms directed at its earlier regulation in the former opinion of this court, and consequently instances of discrimination on account of race are less likely to occur under the regulation now prevailing. Nevertheless that regulation must also be condemned because it occasionally permits discrimination against members of both races in the allotment of dining-room privileges; and the court should therefore hold that the practice of the carrier in segregating the races in its dining-cars

must be suspended whenever its enforcement results in the denial to any individual of his constitutional right of equality of treatment.

[fol. 397] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ELMER W. HENDERSON, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

SOUTHERN RAILWAY COMPANY, Intervenor.

Civil Action No. 3829

DECREE—Filed October 28, 1948

This cause coming on to be heard the 4th day of June, 1948 before the regularly constituted Statutory Court, defendants and intervenor being represented by counsel, and the action being submitted to the Court upon the pleadings, certified records of the proceedings before the Interstate Commerce Commission, and the briefs and arguments of counsel, and the Court having entered its Opinion sustaining the order of the Interstate Commerce Commission entered September 5, 1947 wherein the complaint of plaintiff was dismissed,

It is orderd, adjudged and decreed that the complaint herein be, and the same is hereby dismissed at the cost of plaintiff.

October 28, 1948.

Morris A. Soper, United States Circuit Judge,
William C. Coleman, United States District Judge,
W. Calvin Chesnut, United States District Judge.

Seen: Belford V. Lawson, Jr., Attorney for Plaintiff, W. D. MacFarlane, Attorney for United States, Defendant; Allen Crenshaw, Attorney for Interstate Commerce Commission, Defendant; A. J. Dixon, Attorney for Southern Railway, Intervenor.

[fol. 398] IN THE UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

PETITION FOR APPEAL—Filed November 17, 1948

Elmer W. Henderson, plaintiff in the above entitled cause, feeling himself aggrieved by the final decree of the United States District Court for the District of Maryland, entered in said Court on October 28, 1948, prays an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said plaintiff considers the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated November 17, 1948.

Lawson, McKenzie & Windsor, 2001 11th St., N. W. Washington, D. C.; by B. V. Lawson, Jr., Josiah F. Henry, 22 St. Paul Street, Baltimore, Md., Attorneys for Plaintiff.

[fol. 399] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Civil Action No. 3829

ASSIGNMENT OF ERRORS—Filed November 17, 1948

Comes now the plaintiff and files the following assignment of errors upon which he shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said cause from the decree of the United States District Court for the District of Maryland, entered on the 28th day of October, 1948.

The District Court erred:

1. In concluding that the precise question presented for decision is whether the Interstate Commerce Commission

complied with its direction when the Commission's earlier action was reversed and the case remanded for further proceedings.

2. In giving effect to the Commission's findings as to the volume of traffic, by race of passengers.

3. In giving effect to the Commission's conclusions that the railroad's present regulation provides an equitable and reasonable division between the races of its available dining car space.

4. In holding that the Virginia statute does not embrace dining car service and that the railroad and the Commission did not rely on said statute.

5. In concluding that the undesirability of the location of the table allotted to Negro passengers is non-existent.

6. In giving effect to the Commission's finding that the present dining car regulation is not in violation of section 3 or any other provision of the Interstate Commerce Act.

[fol. 400] 7. In concluding that the inequality existing in the railroad's previous regulation with respect to facilities afforded white and Negro passengers has been removed by the railroad's amended regulation.

8. In concluding that refusal of service to a Negro at any available seat in the diner when the reserved table is occupied is not more unjust or inequitable than the situation where both white and colored passengers must wait because every seat is occupied.

9. In holding that the real question before the Court is equality of treatment, not segregation.

10. In concluding that the complaint necessarily must be dismissed unless the principles regarding equality of treatment of races in interstate transportation have been extended by the Supreme Court since the Court's previous decision.

11. In holding that the cases of Morgan v. Virginia, 328 U. S. 373 and Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 are not pertinent to the present issue and that the covenant cases (Shelley v. Kraemer, — U. S. —; Hurd v. Hodge, — U. S. —; McGhee v. Sipes, — U. S. —, and Urciolo v. Hodge, — U. S. —) have no relation directly or indirectly

to the principles governing the conduct of interstate transportation by common carrier.

12. In holding that there is a very definite distinction between racial segregation in interstate dining car accommodations and in interstate motor travel by common carrier.

13. In holding that the railroad may refuse service to any passenger at a vacant seat allotted to passengers of another race.

14. In concluding that racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races.

[fol. 401] 15. In concluding that the allotment of seats in interstate dining cars does not per se spell inequality as long as such allotment, accompanied by equality of meal service, is made and kept proportionately fair.

16. In dismissing the complaint.

17. In failing to find that the Commission's order is not supported by the evidence and is without rational basis.

18. In failing to hold that the Commission's approval of the regulation, based solely on the race of passengers, is beyond its power.

19. In failing to find that the present regulation violates section 1(4) of the Interstate Commerce Act.

20. In failing to find that the present regulation violates section 3(1) of the Interstate Commerce Act.

21. In upholding the regulation segregating interstate passengers, solely on account of their race.

22. In failing to hold that denial of service to any passenger at a vacant seat is discriminatory and is a denial of the passenger's constitutional right of equality of treatment.

23. In failing to hold that the regulation is discriminatory because it is designed to meet the demands of races and not of the particular, individual passenger.

24. In failing to hold that the Commission's approval of the regulation enforcing segregation, solely on account of

race, is a deprivation of plaintiff's liberty without due process of law.

25. In permitting a common carrier to segregate interstate passengers according to race, a practice forbidden to the States.

26. In failing to hold that the regulation is contrary to the national transportation policy.

27. In failing to hold that the regulation is a burden on interstate commerce.

28. In failing to hold that the regulation is contrary to the public policy against race discriminations and race distinctions.

[fol. 402] Lawson, McKenzie & Windsor, 2001 11th St., N. W., Washington, D. C., by B. V. Lawson, Jr., Josiah F. Henry, 22 St. Paul Street, Baltimore, Md., Attorneys for Plaintiff.

[fol. 403] IN THE UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 17, 1948

In the above entitled cause, Elmer W. Henderson, plaintiff therein, having made and filed his petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered October 28, 1948, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided;

It Is Ordered and Decreed that the appeal be, and the same is hereby allowed as prayed for;

And It Is Further Ordered that the amount of the appeal bond be set at $250.00.

W. Calvin Chesnut, United States District Court.

Dated November 17, 1948.

[fol. 404] Citation in usual form, filed November 17, 1948, omitted in printing.

[fol. 405] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ORDER EXTENDING TIME

Upon motion of Elmer W. Henderson, plaintiff-appellant, and good cause having been shown,

It is ordered, That the time for docketing the case and the filing of the record thereof, in the Supreme Court of the United States, be and the same is hereby enlarged for further period of 30 days from the return day of the citation on appeal.

Dated December 13, 1948.

W. Calvin Chesnut, United States District Judge.

Certificate of Service

I hereby certify that I served the Motion for Order Enlarging Time for Docketing the Case and Filing the Record Thereof with the Clerk of the Supreme Court and Order by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen H. Crenshaw, Attorney for Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C. Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Charles Clark, attorney for Southern Railway Company, P. O. Box 1808, Washington, D. C.

B. V. Lawson, Jr., Attorney for Elmer W. Henderson.

[fol. 406] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

ORDER EXTENDING TIME

Upon motion of Elmer W. Henderson, plaintiff-appellant, and good cause having been shown,

It is ordered, That the time within which this case shall be docketed and the record thereof filed in the Supreme

Court of the United States be, and the same hereby is, extended to and including February 20, 1949.

Dated January 22, 1949.

W. Calvin Chesnut, United States District Judge.

Certificate of Service

I hereby certify that I served the above Order by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen H. Crenshaw, Interstate Commerce Commission, Washington 25, D. C. Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Charles Clark, Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

Dated January 22, 1949.

B. V. Lawson, Jr.

[fol. 407] In United States District Court

Civil Action No: 3829

[Title omitted]

Order as to Original Papers and Documents—Filed January 22, 1949

Upon motion of Elmer W. Henderson, plaintiff-appellant and good cause having been shown,

It is ordered, That the following original papers and documents, in lieu of copies thereof, all of which were received in evidence in this Court in the trial of this cause, be forwarded as a part of the transcript of the record of this case on appeal to the Supreme Court of the United States:

1. Transcript from Interstate Commerce Commission, under Certificate of Secretary, Interstate Commerce Commission, dated August 27, 1945, and filed September 18, 1945, which is designated in paragraph 2(c) of the Stipulation as to Record filed herein on January 22, 1949;

2. Stenographer's minutes of hearing before Interstate Commerce Commission on October 15, 1946 in Henderson v. Southern Railway Company, I.C.C. Docket No. 28895, which is designated in paragraph 3 of the Stipulation as to Record filed herein on January 22, 1949.

Dated January 22, 1949.

W. Calvin Chesnut, United States District Judge.

[fol. 408] IN THE UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 17, 1949

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint and exhibits attached thereto.
2. Answer of United States.
3. Answer of Interstate Commerce Commission.
4. Intervention of Southern Railway and Answer.
5. Transcript of record of hearing on June 4, 1948, together with exhibits introduced in evidence including record before Interstate Commerce Commission in Henderson v. Southern Railway Co., Docket No. 28895.
6. Opinion filed September 25, 1948.
7. Final decree entered October 28, 1948.
8. Petition for appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Citation on appeal.
12. Statement directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.
13. This praecipe.

Dated December 11, 1948.

Lawson, McKenzie & Windsor, 2001 11th St., N. W., Wash., D. C., by B. V. Lawson, Jr.

Josiah F. Henry, 22 St. Paul St., Baltimore, Md., Attorneys for Plaintiff (Appellant).

[fol. 409] Certificate of Service

I hereby certify that I served the above praecipe for transcript of record by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen Cren-

shaw, Interstate Commerce Commission, Washington 25, D. C. Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. Charles Clark, Southern Railway Company, P. O. Box 1808, Washington, D. C.

Dated December 11, 1948.

B. V. Lawson, Jr., Attorney for Elmer W. Henderson, Plaintiff (Appellant).

[fol. 410] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

STIPULATION AS TO RECORD—Filed January 22, 1949

It is stipulated by and between counsel for the parties hereto that the following papers and documents are included in Item 5 of Plaintiff-Appellant's Praecipe for Transcript of Record and are designated as a part of the record of this case on appeal to the Supreme Court of the United States:

1. Transcript of hearing in this Court on June 4, 1948.

2. The record in the prior case (Henderson v. United States, Civil Action No. 2455, United States District Court for the District of Maryland) shall consist of:

a. Complaint and plaintiff's exhibit A.

b. Answer of Interstate Commerce Commission.

c. Amendment to Answer of Interstate Commerce Commission and I. C. C. Orders in Henderson v. Southern Railway Co., I. C. C. Docket No. 28895, dated May 13, 1944 and September 18, 1944.

d. Answer of Southern Railway Company.

e. Transcript from Interstate Commerce Commission, under certificate of Secretary, I. C. C. of August 27, 1945, filed September 18, 1945.

f. Opinion of the Court.

g. Decree dated February 13, 1946.

3. Stenographer's minutes of hearing before the I. C. C. on October 15, 1946, in Henderson v. Southern Railway Co.,

I. C. C. Docket No. 28895, pp. 195 to 239, prepared by Alderson Reporting Co., 306 9th St., N. W., Washington, D. C., official reporters, and Exhibits 3 to 9 of the Southern Railway Company, said minutes and exhibits not under the [fol. 411] certificate of the Secretary, Interstate Commerce Commission.

Dated January 18, 1949.

Lawson, McKenzie & Windsor, 2001 11th St., N. W., by B. V. Lawson, Jr.; Josiah F. Henry, 22 St. Paul St., Balt., Md., Attorneys for Elmer W. Henderson, Plaintiff-appellant. Allen Crenshaw, Attorney for Interstate Commerce Commission. Edward Dumbauld, Special Assistant to the Attorney General. Charles Clark, A. J. Dixon, Attorney for Southern Railway Company.

[fol. 412] IN UNITED STATES DISTRICT COURT

Civil Action No. 3829

[Title omitted]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 22, 1949

To the Clerk of the above-named Court:

You are hereby requested in preparing the transcript of the record in the above entitled case to be filed in the Supreme Court of the United States, pursuant to the appeal allowed therein, to include in such transcript the following portions of the record in addition to those indicated in the plaintiff-appellant's praecipe for transcript of record filed herein:

1. Order entered December 13, 1948 enlarging time for docketing the case and filing the record thereof with the Clerk of the Supreme Court.

2. Stipulation as to Record filed January 22, 1949.

3. Order of January 22, 1949 extending time to February 20, 1949 for docketing the case and filing record thereof in the Supreme Court of the United States.

4. Order of January 22, 1949 as to Original Papers and Documents.

5. This supplemental praecipe.

Dated January 22, 1949.

Lawson, McKenzie Windsor, 2001 11th St., N. W., Washington, D. C., by B. V. Lawson, Jr.

Josiah F. Henry, 22 St. Paul St., Balt., Md., Attorneys for Plaintiff-Appellant.

Certificate of Service

I hereby certify that I served the above supplemental praecipe for transcript of record by mailing copies thereof to each of the attorneys for appellees addressed as follows: Allen H. Crenshaw, Attorney for Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C. Edward H. Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C. [fol. 413] Charles Clark, Attorney for Southern Railway Company, P. O. Box 1808, Washington, D. C.

B. V. Lawson, Jr., Attorney for Elmer W. Henderson, Plaintiff-Appellant.

[fol. 414] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 415] In the Supreme Court of the United States

Statement of Points to Be Relied on and Designation of Parts of Record to Be Printed—Filed March 2, 1949

Appellant Elmer W. Henderson, pursuant to Rule 13, paragraph 9, states that he will rely upon the points made in his assignment of errors and, for the purpose of enabling this Court to consider said points, designates the following parts of the record to be printed:

1. Complaint and Exhibits A and B (Appellant's Praecipe for Transcript of Record, Item 1) R. 4.

2. Answer of United States (Appellant's Praecipe for Transcript of Record, Item 2). R. 14.

3. Answer of Interstate Commerce Commission (Appellant's Praecipe for Transcript of Record, Item 3). R. 16.

4. Answer of Southern Railway Company (Appellant's Praecipe for Transcript of Record, Item 4). R. 24.

5. Transcript of hearing on merits on June 4, 1948 and, of the exhibits therein received, the following (Appellant's Praecipe for Transcript of Record, Item 5) R. 25:

A. Henderson v. United States, Civil Action 2455:

(1) Complaint (Stipulation as to Record, Item 2a). R. 145.

(2) Answer of Interstate Commerce Commission (Stipulation as to Record, Item 2b). R. 160.

(3) Amendment to Answer of Interstate Commerce Commission (Stipulation as to Record, Item 2c). R. 167.

(4) Answer of Southern Railway Company (Stipulation as to Record, Item 2d). R. 168.

(5) Opinion of the Court (Stipulation as to Record, Item 2f). R. 124.

(6) Decree dated February 13, 1946 (Stipulation as to Record, Item 2g). R. 170.

B. Henderson v. Southern Railway Company, Interstate Commerce Commission Docket No. 28895:

(1) Complaint (Stipulation as to Record, Item 2e).

(2) Answer of Southern Railway Company (Stipulation as to Record, Item 2e).

(3) Transcript of hearing before Interstate Commerce Commission on February 24, 1943, pp. 1-154 (Stipulation as to Record, Item 2e).

(4) Report and Order of Interstate Commerce Commission entered May 13, 1944 (Stipulation as to Record, Item 2e).

[fol. 416] (5) Order of Interstate Commerce Commission entered September 18, 1944 (Stipulation as to Record, Item 2e).

(6) Transcript of hearing before Interstate Commerce Commission on October 15, 1946 and exhibits 3 to 9 inc. (Stipulation as to Record, Item 3). pp. 195-238.

6. Opinion of the Court, September 25, 1948 (Appellant's Praecipe for Transcript of Record, Item 6). R. 90.

7. Final decree entered October 28, 1948 (Appellant's Praecipe for Transcript of Record, Item 7). R. 110.

8. Petition for Appeal (Appellant's Praecipe for Transcript of Record, Item 8). R. 111.

9. Assignment of Errors (Appellant's Praecipe for Transcript of Record, Item 9). R. 113.

10. Order allowing Appeal (Appellant's Praecipe for Transcript of Record, Item 10). R. 112.

11. Citation on appeal (Appellant's Praecipe for Transcript of Record, Item 11). R. 117.

12. Statement directing attention to paragraph 3 of Rule 12 and proof of service (Appellant's Praecipe for Transcript of Record, Item 12). R. 118.

13. Order of December 13, 1948 extending time for docketing appeal, etc. (Appellant's Supplemental Praecipe for Transcript of Record, Item 1). R. 172.

14. Order of January 22, 1949 extending time for docketing appeal, etc. (Appellant's Supplemental Praecipe for Transcript of Record, Item 3). R. 177.

15. Order of January 22, 1949 as to Original Papers and Documents (Appellant's Supplemental Praecipe for Transcript of Record, Item 4). R. 175.

16. Appellant's Praecipe for Transcript of Record (Appellant's Praecipe for Transcript of Record, Item 13). R. 178.

17. Stipulation as to Record (Appellant's Supplemental Praecipe for Transcript of Record, Item 2). R. 143.

18. Appellant's Supplemental Praecipe (Appellant's Supplemental Praecipe for Transcript of Record, Item 5). R. 180.

Dated March 2, 1949.

Lawson, McKenzie & Windsor, 2001 11th St., N. W., Washington 1, D. C., Attorneys for Appellant, by B. V. Lawson, Jr.

[fol. 417] Certificate of Service

It is hereby certified that a copy of the above Statement of Points to be Relied on and Designation of Parts of Record to be Printed was this day served upon counsel for appellees by mailing the same to them addressed as follows:

Allen H. Crenshaw, Esq., Interstate Commerce Commission, Washington 25, D. C.

Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

Charles Clark, Esq., A. J. Dixon, Esq., Attorneys for Southern Railway Company, P. O. Box 1808, Washington 13, D. C.

March 2, 1949.

B. V. Lawson, Jr., Attorney for Appellant.

[fol. 418] Supreme Court of the United States

Order Noting Probable Jurisdiction—March 14, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 53,572. U. S. D. C., Maryland. Term No. 570. Elmer W. Henderson, Appellant, vs. The United States of America, Interstate Commerce Commission and Southern Railway Company. Filed February 17, 1949. Term No. 570 O. T. 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~350~~ 25

25

ELMER W. HENDERSON,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

B. V. LAWSON,
Counsel for Appellant.
LAWSON, MCKENZIE & WINDSOR,
JOSIAH F. HENRY,
Of Counsel.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 3829

ELMER W. HENDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION

Defendants,

SOUTHERN RAILWAY COMPANY,

Intervenor.

STATEMENT AS TO JURISDICTION UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Elmer W. Henderson, plaintiff in the above entitled cause, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provision

The statutory provision believed to sustain the jurisdiction is U. S. C. Title 28, Section 1253 (Act of June 25, 1948, C. 646, 62 Stat. —).

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on October 28, 1948. The petition for appeal was presented and allowed on November 17, 1948, together with the assignment of errors.

D. Nature of the Case and the Rulings Below

This is an appeal from the decree of the United States District Court for the District of Maryland, entered October 28, 1948, dismissing the complaint. The suit was brought to enjoin, set aside and suspend an order of the Interstate Commerce Commission entered September 5, 1947, dismissing the complaint in the proceedings known as *Henderson* v. *Southern Railway.*

These proceedings had their origin in a complaint filed before the Interstate Commerce Commission on October 10, 1942, known as *Henderson* v. *Southern Railway,* in which it was alleged that the Southern Railway, intervener, violated the provisions of 49 U. S. C. 1(4) and 49 U. S. C. 3(1) in refusing to serve the plaintiff at tables allegedly reserved for Negroes where there were vacant seats, although providing service there for white passengers, and in the use of

a curtain around the tables allegedly reserved for Negro passengers. The complaint prayed that the railroad be ordered to desist from the alleged unlawful acts, that it be required to discontinue the practice of using curtains around the tables reserved for Negroes, and for damages. The Commission issued its report, finding plaintiff had been subjected to undue and unreasonable prejudice and disadvantage, that there was no necessity for an order for the future, and by its order of May 13, 1944 dismissed the complaint. (258 I. C. C. 413.)

An appeal was taken to the District Court of the United States for the District of Maryland to set aside the Commission's action. The Court held that racial segregation of interstate passengers is not *per se* forbidden by the Constitution, the Interstate Commerce Act, nor any other Act of Congress and has been approved by the Supreme Court; that the railroad's dining car regulation did not provide substantial equality of treatment; and by its decree of February 15, 1946 remanded the case to the Commission for further proceedings in light of the principles outlined in its opinion. (*Henderson* v. *U. S.*, 63 F. Supp. 906.)

After further hearing before the Commission at which was presented the railroad's amended dining car regulation providing for the absolute reservation of one table for Negro passengers next to the kitchen, opposite the steward's office, and separated from the remainder of the dining car by a 5 foot wooden partition, the Commission found that the new regulation is not violative of any provision of the Interstate Commerce Act; that an order for the future is not necessary; and by its order of September 5, 1947 dismissed the complaint.

An appeal from this order was taken to the District Court of the United States for the District of Maryland which held, in its opinion of September 26, 1948 (*Henderson* v.

U. S., —, F. Supp. —), that the amended dining car regulation removed the inequality found to exist prior thereto; that the present provision for dining car service does not permit an unjust discrimination against Negro passengers; that there is a very definite distinction between segregation in interstate buses and interstate dining car accommodations; that racial segregation of interstate passengers is not forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, provided there is no real inequality of treatment of passengers; that allotment of seats by race of passengers, if equality of service is proportionately fair, is not *per se* real inequality; and that refusal to seat and serve a passenger at any vacant seat in the dining car, when the table or tables provided for persons of his race are occupied, is no more unjust or inequitable than the wait necessary for all passengers when all seats in the dining car are occupied. By its decree of October 28, 1948 the complaint was dismissed.

The questions presented by this appeal are substantial ones. In 1896 the Supreme Court, in *Plessy* v. *Ferguson*, 163 U. S. 537, held that a state law requiring segregation by race of intrastate passengers was not an abridgement of a colored passenger's privileges and immunities, a deprival of property (the reputation of belonging to the dominant race) without due process of law, nor a denial of equal protection of the laws, under the 14th Amendment. That decision constituted a precedent which, the plaintiff believes, has erroneously been used in numerous cases to uphold segregation, giving rise to the doctrine of separate but equal, which has been adhered to by the Commission and the District Court in this case. Experience has shown in every area where segregation is practiced that separation is enforced but the proviso of equality is never complied with.

This case involves the question of whether segregation is discrimination, because inequality invariably accompanies segregation, because the doctrine of substantial equality should not apply to fundamental, constitutional, personal rights, and whether segregation is discrimination *per se*. Second, there is presented the question whether a vacant seat may be denied any passenger solely because of his race. Third, with respect to national uniformity in interstate travel regulations, there is a conflict between the approved practice of racial segregation on interstate dining cars and the Supreme Court's prohibition of racial segregation in interstate motor travel as a burden on interstate commerce. Fourth, it involves the question whether allotment of seats according to race, based on the comparative volume of traffic, affords equality of treatment to the individual passenger. Fifth, there is involved the extent of the Commission's and the District Court's power and authority in approving a regulation, based solely on race, restricting plaintiff's liberty by enforced segregation, in the light of the national policy against racial distinctions and classifications, as expressed in the United States Constitution, treaties of the United States, Acts of Congress, and judicial decisions.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal

Mitchell v. *U. S.*, 313 U. S. 80;
Alton Rrd. Co. v. *U. S.*, 287 U. S. 229;
Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125.

F. Opinions and Decree

Appended to this statement are a copy of the opinion in this case on the first appeal (*Henderson* v. *U. S.*, 63 F.

Supp. 906) and of the opinion and decree of the District Court here sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court has jurisdiction of the appeal.

Dated November 17, 1948.

B. V. LAWSON, JR.,
Counsel for Appellant.

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Of Counsel.

APPENDIX "A"

Filed 17th December, 1945

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND

No. 2455. Civil Docket

We concur: Morris A. Soper, U. S. Circuit Judge; W. Calvin Chesnut, U. S. District Judge.

Argued September 24, 1945. Decided Dec. 17, 1945.

ELMER W. HENDERSON, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Soper, Circuit Judge, and Coleman and Chesnut, District Judges

Opinion of the Court

COLEMAN, *District Judge:*

This is a suit under the provisions of 28 U. S. C. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), whereby the plaintiff seeks to set aside an order of the Interstate Commerce Commission, entered May 13, 1944, with respect to dining car service on the Southern Railway.

On October 10th, 1942, the plaintiff filed a complaint with the Commission alleging (as amended at the original hearing) that the Southern Railway, on May 17th, 1942, had, with respect to its dining car service, unjustly discriminated against him in violation of the provisions of Section 3(1) of the Interstate Commerce Act (49 U. S. C. A. sec. 3(1)), and Section 2, Par. 1 of Article IV of the Constitution of the United States, by failing to furnish him dining car service equal to that furnished white passengers. The complaint prayed that the Commission require the carrier to cease and

desist from the alleged discrimination; in the future to afford complainant and other interested Negro passengers dining car facilities and such other services and facilities as the Commission might deem reasonable and just, equal to those accorded its white passengers, and asked also for damages to be assessed against the carrier because of the alleged discrimination.

The Southern Railway answered the complaint, denying that it had violated any Constitutional provision or any provision of the Interstate Commerce Act or of any other law. The complaint, according to the usual procedure, was referred by the Commission to an examiner for the purpose of conducting a hearing, which was held on February 24th, 1943. At this hearing, complainant alone testified in his own behalf and six witnesses were heard for the railroad.

The examiner filed his report on May 28th, 1943, recommending that the Commission should find that complainant had been subjected to unjust discrimination and prejudice, but that the situation had been corrected for the future and that, therefore, the complaint should be dismissed. Complainant excepted to the examiner's report, alleging that the Virginia segregation statute (Virginia Code 1942, (Michie), Secs. 3962-68), upon which the examiner relied in part, was inapplicable; that segregation of races is contrary to the Federal Constitution and the Interstate Commerce Act; that damages should be assessed, and that the alleged discrimination and prejudice had not been corrected for the future. Thereupon, the complainant was granted a hearing before Division #2 of the Commission, briefs were filed and oral arguments submitted, and on May 13th, 1944, that Division filed its report (258 I. C. C. 413), making detailed findings of fact and conclusions based thereon, all of which are substantially in accord with the examiner's report and recommendations.

The material facts as found by the Commission and set forth in its report, are not disputed by the parties in the present proceeding, and are as follows: On May 17th, 1942, the complainant, a Negro, citizen of the United States, left Washington at approximately 2 P. M. aboard the Southern Railway's Train #35, for Atlanta, Ga., traveling as a first class Pullman passenger. The train consisted of 1 combi-

nation baggage-passenger car, 6 coaches, 2 Pullman cars and 1 dining car with seats for 36 persons. It carried approximately 300 passengers, about 100 more than the usual number, which necessitated the use of 3 extra coaches. The Pullman cars were in the rear of the dining car, thus making it necessary for Pullman passengers desiring dining car service to enter the diner alongside the kitchen of the dining car. From this end the tables on the left side of the diner accommodated 4 persons and those on the right side, 2 persons. The diner was equipped with curtains which, when drawn, separated the two tables nearest the kitchen from the other tables, these curtains extending, when drawn, from the sides of the diner to but not across its center aisle, nor along the aisle side of either of these end tables.

When the diner was opened about 5:30 P. M. on May 17th, 1942, and as the train was proceeding through the State of Virginia, a number of passengers were waiting to enter. It filled promptly. When all tables other than the two tables at the kitchen end of the car had been occupied, no Negro passenger having appeared, white passengers were seated at the end tables. Some of the passengers who were in line when the diner was opened, remained standing when the car was filled. Complainant did not take a position in the line but walked past people who were waiting to be served in turn. At least one seat at one of the end tables at the kitchen end of the diner was empty when complainant first demanded service but neither then nor later was either of these end tables entirely vacant. The diner was filled continuously, passengers from the line taking seats as soon as others vacated them, and from time to time diner patrons were served dinner until it became necessary to decline further service, in order that the car would be clear of patrons when the train reached Greensboro, North Carolina. Complainant was tendered and declined service in his Pullman car space without charge therefor in addition to the regular dining car prices. The service offered him differed from that furnished in the dining car only as respects the place of service. The steward did not send for complainant as he had promised to do because at no time during the meal period was there available space in which complainant could be served in the diner in a compartment separated from

tables that were occupied by white passengers. Complainant was one of many passengers who sought dining car service and who had not been served when the car was removed from the train at approximately 9:00 P. M.

For many years, it was defendant's practice to serve meals to passengers of different races at different times. Negro passengers, being in the minority, were served either before or after the white passengers had eaten. The increase in passenger traffic in 1941, due to defense activities, made necessary some plan whereby both races could be accommodated at the same time. It was found that the length of time required for serving white passengers would extend into the time for the next meal, leaving no time in which to serve Negro passengers. The installation of curtains was designed to correct that situation. Since the time of complainant's journey, defendant's dining cars have been equipped with 4-seat tables on both sides, thereby increasing to 48 the capacity of the car, and to 8 the number of seats at the end tables.

In July, 1941, defendant issued to its passenger department employees a circular of instructions concerning accommodations for passengers of different races, which contains the following:

"Dining Car Regulations

"Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

On August 6, 1942, these instructions were supplemented as follows:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"'Reserved' cards are being supplied you."

As passengers enter the dining car when it is opened for meal service, it is defendant's practice to seat some of them at each waiter's "station", or group of tables so that all the waiters may be engaged promptly and service expedited. If any Negro passengers are present, they are seated and served at the end tables. Relatively few Negro passengers use the dining car, and for that reason the end tables are not absolutely reserved for their exclusive use; but white passengers are not seated at them until the other tables are filled. Then, if no Negro passengers present themselves, the end tables are used for white passengers. If a Negro passenger requests service when both end tables are fully or partially occupied by white patrons, the practice is to offer him service in his Pullman space or at his coach seat, using a portable table, without the extra charge usually made for that service. When so served, the passenger receives the same food and waiter service that is furnished dining car patrons, and the dishes, silverware, and linens are those used in the dining car. Negro civilians are served in the dining car simultaneously with white passengers only at the end tables. White and Negro soldiers are served together, without distinction.

On these facts the Commission made three ultimate findings, (1): That defendant's treatment of complainant with respect to dining car service subjected him to undue and unreasonable prejudice and disadvantage in violation of

Section 3 of the Interstate Commerce Act; but that (2): The defendant's dining car rules and regulations in effect at the time in question, when considered with defendant's supplementary rules and regulations issued on August 6th, 1942, are adequate, and therefore no order in respect to these rules was necessary for the future; and (3): That complainant had sustained no compensable damage as a result of the disadvantage caused him by defendant. Accordingly, the Commission issued its order on May 13, 1944, dismissing the complaint. Thereafter, complainant petitioned for a hearing before the full Commission, but this was denied by order entered September 18, 1944 and on January 26, 1945, the present proceeding was instituted. In the complaint it is alleged that the treatment given the complainant with respect to dining car service violated (1) Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. Sec. 3(1)); (2) the national transportation policy as defined in that Act (49 U.S.C.A. Sec. 1, note); and (3) the Civil Rights Act, 8 U.S.C.A. Sec. 41, 43, enforcing Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The specific form of injunctive relief sought is that the Commission order the Southern Railway Company to cease and desist from the form of treatment with respect to dining car service given the complainant, and to establish and enforce in the future, for the benefit of complainant and other Negro passengers, dining car facilities and services unconditionally identical with those established and enforced for white passengers, including the discontinuance of the Railway Company's present practice of using curtains around dining car tables provided for Negro passengers. The complainant concedes that the Commission's denial of damages is not reviewable by this Court. See Standard Oil Co. *v.* U. S., 283 U. S. 235; George Allison & Co. *v.* United States, 296 U. S. 546; Ashland Coal & Ice Co. *v.* United States, — Fed. (2d) —, affirmed per curiam, — U. S. —.

For a proper understanding of what the Commission decided apart from the matter of damages, we quote the following from its opinion (258 I.C.C. 413, at pages 418-419):

"The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate passengers. See Chiles v. Chesapeake & O. Ry. Co., 218 U. S. 71, and cases therein cited. Section 3(1) of the act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In Mitchell v. United States, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus it is seen that substantial equality of treatment only is required of the carrier.

"It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

"As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to

a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

"We find that complainant was subjected to undue and unreasonable prejudice and disadvantage in the respect already stated. As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose."

The questions presented for our determination in this proceeding are basically two, as evidenced by complainant's contentions, and may be summarized as follows: (1) Is any form of racial segregation of interstate passengers in dining cars a preference, prejudice or discrimination in and of itself in violation of the Civil Rights Act, or the Interstate Commerce Act, or both; and (2) even if a certain degree of such segregation be valid, are the present rules and regulations of defendant respecting its dining car service nevertheless invalid because they do not provide substantial equality of treatment in that (a) curtained tables are required for Negroes and not for white; and (b) service at such tables may be refused even though there be empty seats at such tables?

The position of the Interstate Commerce Commission is that (1) although it has found that in the particular instance complainant had been subjected to undue and unreasonable prejudice and disadvantage, it further found that such was the result of a casual incident and not of the Railroad's general practice, and therefore the entry of an order for the future would serve no useful purpose, and the decision of the Commission in this respect being founded upon a rational basis, should not be disturbed; and (2) to order the Commission to require the railroad to do more would be, in effect, to order that segregation cease, whereas neither the Commission nor this Court has jurisdiction in the present proceeding to determine whether or not segre-

gation in and of itself is a discrimination forbidden by the Constitution, the Interstate Commerce Act, or any other Federal statute.

The Southern Railway, as intervening defendant, contends that the finding that its existing rules are adequate, is a determination of fact within the exclusive jurisdiction of the Commission, and therefore may not be upset by this Court.

The Government has not seen fit to be represented separately and to take part in any phase of this litigation from its inception, as it has the statutory right to do. This, however, does not foreclose the intervening defendant, the Southern Railway, from challenging the actions of the Commission. Interstate Commerce Commission *v.* Oregon-Washington Railroad Co., 288 U. S. 14.

At the outset we must determine whether there is any merit in the jurisdictional question raised by the Commission, namely, that this Court may not alter the Commission's finding of equality of treatment since that is a determination of fact exclusively within the jurisdiction of the Commission.

The Commission's position, it will be seen, is tantamount to saying that in a case of this kind judicial review of the Commission's action is completely foreclosed, even as respects the question of whether it may have exceeded its statutory or constitutional authority in entering a particular order. We do not understand that such is the law. The Supreme Court said in Rochester Telephone Corp. *v.* United States, 307 U. S. 125, 139, that two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission have been evolved. "One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426. Thereby matter which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. *Only questions affecting constitutional power, statutory authority, and*

the basic pre-requisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Comm'n. *v.* Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Comm'n. *v.* Union Pacific R. Co., 222 U. S. 541." (Italics inserted).

The complainant is directly asserting in this proceeding that to allow the Commission's order here under review to stand, would be tantamount to approving a rule or practice on the part of the Southern Railway that is violative of complainant's constitutional rights and not within the statutory power of the Interstate Commerce Commission to approve, so we are called upon not merely to review the correctness of a factual situation upon which the Commission has ruled, in a field exclusively within its province,—as for example, one involving rates or other charges by an interstate carrier,—but to rule upon questions, the determination of which has not been, and cannot be exclusively delegated to any administrative body, but must remain subject to judicial review. The fact that the Commission's order is negative in form, i.e., that it dismissed the complaint, makes no difference. Rochester Telephone Corporation *v.* United States, supra; Mitchell *v.* United States, 313 U. S. 80.

We turn then to a consideration of the first of complainant's two basic contentions: namely, that any form of racial segregation of interstate passengers in dining cars should be declared to be, in and of itself, a form of discrimination forbidden by the Federal Constitution and the Interstate Commerce Act.

We must at the very outset recognize the distinction between segregation and equality of treatment. The equal rights clause of the Constitution, Article IV, Section 2, does not import that a citizen of one State carries with him into another State any fundamental privileges or immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but simply that in any State, every citizen of every other State shall have the privileges and immunities which the citizens of that State enjoy. In short, this provision merely prevents a State from discrimi-

nating against citizens of other States in favor of its own citizens. Downham *v.* Alexandria Council, 10 Wall. 173; Chambers *v.* Baltimore & Ohio R. R. Co., 207 U. S. 142; LaTourette *v.* McMaster, 248 U. S. 465; Chalker *v.* Birmingham & N. W. Rwy. Co., 249 U. S. 522; Shaffer *v.* Carter, 252 U. S. 37; United States *v.* Wheeler, 254 U. S. 281; Douglas *v.* New York, New Haven and Hartford Ry. Co., 279 U. S. 377; Whitfield *v.* Ohio, 297 U. S. 431; Hague *v.* C. I. O., 307 U. S. 496. Similarly, the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment. The Slaughterhouse Cases, 16 Wall. 36. And it has been repeatedly declared by the Supreme Court that race segregation by State law is not per se an abridgement of any constitutional right secured to the citizen. See Plessy *v.* Ferguson, 163 U. S. 537; McCabe *v.* Atchison T. & S. F. Ry. Co., 235 U. S. 151; Missouri ex rel. Gaines *v.* Canada, 305 U. S. 337. By virtue of the Commerce Clause of the Constitution, Congress might legislate specifically with respect to segregation in interstate travel, but Congress has not done so. However, Section 3, paragraph 1 of the Interstate Commerce Act makes it unlawful to subject any person in interstate commerce to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and this prohibition clearly embraces the matter of dining car facilities, just as seating, sleeping or any other facilities in interstate commerce. Stamps *v.* Chicago R. I. & P. Ry. Co., 253 I. C. C. 557; LeFlore & Crishon *v.* Gulf, M. & O. R. R. Co., 262 I. C. C. 403; Barnett *v.* Texas & P. Ry. Co., — I. C. C. —. Furthermore, the right to a particular accommodation or facility does not depend upon the volume of traffic, because although the supply of particular accommodations or facilities may be conditioned upon there being a reasonable demand therefor, if such accommodations or facilities are in fact provided, substantial equality of treatment of persons traveling under like conditions cannot lawfully be withheld. Mitchell *v.* United States, supra. Thus, while inaction of Congress as respects segregation in interstate travel is equivalent to a declaration that interstate carriers can separate Negro and white pas-

sengers, they may do so only if they afford substantial equality of treatment to members of both races when traveling under like conditions. Hall *v.* deCuir, 95 U. S. 485; Louisville, etc., Railway Co. *v.* Mississippi, 133 U. S. 587; Plessy *v.* Ferguson, supra; Chesapeake & Ohio Ry. Co. *v.* Kentucky, 179 U. S. 388; Chiles *v.* C. & O. Ry. Co., 218 U. S. 71; McCabe *v.* Atchison T. & S. F. Ry. Co, supra. Therefore, although the Supreme Court of Appeals of Virginia has held, since the Commission decided the present case, in Morgan *v.* Commonwealth, 34 S. E. (2d) 491, that the Virginia segregation laws with respect to public motor carriers, which are kindred to that State's segregation laws with respect to rail carriers—all of which laws were in effect at the time the discrimination against the present complainant is alleged to have occurred,—apply to interstate as well as intrastate passengers, it is not necessary to approach the present case from this aspect, because, as we have said, the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decision; and likewise, the railway company does not rely upon them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case because it does not, at least in terms, purport to embrace dining car service. Virginia Code 1942 (Michie) Sec. 3962-3. These sections read: "Sec. 3962. SEPARATE CARS FOR WHITE AND COLORED PASSENGERS.—All persons, natural or artificial, who are now, or may hereafter be, engaged in running or operating any railroad in this State by steam for the transportation of passengers are hereby required to furnish separate cars or coaches for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial partition, with a door therein, shall be deemed a separate coach within the meaning of this section, and each sepaarte coach or compartment shall bear in some conspicuous place appropriate words in plain letters, indicating the race for which it is set apart." "Sec. 3963. COMPANY TO MAKE NO DISCRIMINATION IN QUALITY OF ACCOMMODATIONS FOR WHITE AND COLORED PASSENGERS.

—No difference or discrimination shall be made in the quality, convenience, or accommodation in the cars or coaches or partitions set apart for white and colored passengers under the preceding section." Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case, because nothing meaning of this section, and each separate coach or compartments "divided by a good and substantial partition, with a door therein," would satisfy those provisions.

It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, we turn to a consideration of complainant's second contention, which is that, even though it be held that the defendant carrier may lawfully segregate complainant because of his race while affording him dining car facilities, the segregation actually still permitted by the defendant railroad's present regulations which the Commission has approved is unlawful; because not affording him treatment substantially equal to that afforded white passengers under like conditions.

This contention brings us at once face to face with the necessity of passing upon the validity of the dining car regulations of the Southern Railway, in effect at the time in question, because although these regulations have not been promulgated by the Interstate Commerce Commission, they have been directly approved by it, as a result of its decision and order which is the basis of the present complaint. Therefore, they are to be treated, for the purposes of this case, as in effect the Commission's rules. This is obviously true for the further reason that the present complainant is contending that the Commission erred in not requiring the Southern Railway to cease and desist from applying these rules; or more specifically, that the Southern Railway should be required henceforth to abstain from adopting any rule or regulation with respect to its dining car service that imposes,—as it is claimed the present rules do,—upon Negro passengers, restrictions not imposed upon white passengers, under like conditions. Complainant's right to complain does not depend upon

whether he intends to make a similar journey in the future. Mitchell *v.* United States, supra.

These dining-car regulations have been quoted in an earlier part of this opinion in their entirety. It is to be noted that what the present complainant is really seeking is that he shall be given an absolute right to—a guarantee of—*the same service in every respect* accorded to white passengers under like conditions. The defendant's dining-car regulations in effect on May 17th, 1942, that is, at the time of the alleged discrimination against the complainant, contained only a very general provision with respect to service of meals in dining cars at one and the same time to Negro and white passengers. They merely provided that "if the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

As we have seen, applying his own interpretation to this rule, the dining car steward allowed white passengers to occupy the end seats allotted to colored passengers before the complainant appeared and applied for diner service; and that, since the train was crowded with white passangers, he, the steward, continued to allow additional white passengers to be seated and served at these end tables, with the result that there never was a time during the hours when the dining car was open to passengers, that meals could be served therein to the complainant or to any other Negro passengers, at any table at which there were not one or more white passengers. This, as we have seen, the Commission found resulted in an unjust, undue and unreasonable prejudice and disadvantage to complainant in violation of Section 3 (1) of the Interstate Commerce Act. It is our opinion that this conclusion was correct. However, the Commission further found that the supplementary dining car regulations put into effect by the defendant carrier on August 6th, 1942, adequately provided against the recurrence of such prejudice and disadvantage as respects complainant or any other possible Negro passengers on defendant's lines, and therefore, the Commission deemed the entry of an order for the future would serve

no useful purpose. We are thus called upon to determine whether or not this interpretation by the Commission of the carrier's rules now in effect is correct; that is to say, we must determine whether they do, in fact, afford substantial equality of treatment to both Negro and white passengers with respect to dining car service.

We requote the pertinent parts of these supplementary instructions as follows: "Before starting each meal pull the curtains to service position and place a "reserve" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables. After the tables are occupied by white passengers, then should colored passengers present themselves, they should be advised that they will be served just as soon as those compartments are vacated."

It is to be noted that the above instructions do not in fact require the setting aside of the two tables referred to *exclusively* for Negro passengers, but merely say that they "are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed, and white passengers served at those tables. Obviously, the word "then" refers to any time during which meals are being served when there happen to be more white passengers applying for meals than can be accommodated at other than the reserved tables. At least if it does not mean this, it gives no indication to the steward as to how long he should wait before assuming that no Negro passengers *will* present themselves. Nothing is contained in the regulations requiring the steward to take steps to ascertain whether there be any such persons on the train. Furthermore, the regulations do not take into account the probability that a Negro passenger may not desire a meal as soon as he boards the train and the dining car opens, or that he may board the train at an intermediate point after the dining car service has been begun and may

desire at that time or later to be served in the dining car. In none of these contingencies do the regulations offer any assurance that the Negro passenger will have a reasonable chance to be served in the dining car before his journey ends.

Therefore, we believe that the Commission erred in holding that the defendant's general practice as evidenced by its current instructions, will result in no substantial inequality of treatment as between Negro and other passengers seeking dining car service. In the case of the white passenger, he is merely required to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionally reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eye of the law requires. None of the methods of segregation have been employed which have heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of the car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

We accept the Commission's construction of the supplemental regulation and its finding that the general practice thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But nevertheless in our opinion the regulation so construed, applied and practiced does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the

segregation of white and colored passengers by the reservation of particular tables for colored passengers; nor do we think it unreasonable, in view of the recently prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers, or if none there, elsewhere in the dining car.

The analogy of the Mitchell case is very close. There Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at 96-97): "It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specially assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passenger cannot, the latter are subjected to inequality and discrimination because of their race.' . . .

"While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served in coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again, the analogy to the Mitchell case is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches.

There remains to be considered one additional contention of the complainant, namely, that that part of the railroad's regulations which requires tables for Negro passengers in dining cars to be curtained also violates the rule of substantial equality in that such means of separation causes Negro passengers humiliation and embarrassment to which white passengers are not subjected. Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine.

For the reasons given, herein the order of the Commission dismissing the complaint must be set aside and the case remanded to the Commission for further proceedings in the light of the principles outlined herein.

WILLIAM C. COLEMAN.

APPENDIX "B"

Opinion—Filed 25 September 1948

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MARYLAND

Civil No. 3829

Argued June 4th, 1948. Decided September 25, 1948

ELMER W. HENDERSON, *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, *Defendants*.

Lawson, McKenzie & Windsor (B. V. Lawson, Jr., of Washington, D. C.; Josiah F. Henry, Jr., of Baltimore), for plaintiff.

Daniel W. Knowlton and Allen Crenshaw for Interstate Commerce Commission.

Bernard J. Flynn, United States Attorney, and Charles Clark and A. J. Dixon, of Washington, D. C., for Southern Railway Co.

Before Soper, Circuit Judge, and Coleman and Chesnut, District Judges

Order of Interstate Commerce Commission—Dining Car Service Afforded Negro Passengers on The Southern Railway—Alleged Discrimination—Complaint Dismissed.

COLEMAN, *District Judge*:

This suit is brought by the plaintiff, under the provisions of 28 U. S. C. A. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), to set aside an order of the Interstate Commerce Commission entered on September 5th, 1947. The contested order involves dining car service afforded Negro passengers on the Southern Railway. This is the second time that the present plaintiff has litigated

the question before the Commission and this Court. The Southern Railway asked for, and was granted leave to intervene as a party defendant, it having been the sole defendant in the proceeding before the Commission which resulted in the issuance of the order which plaintiff now seeks to annul.

The facts involved in the prior proceeding, before both the Commission and this Court, which led up to the present suit may be summarized as follows: On October 10th, 1942, the plaintiff, a Negro, filed a complaint with the Interstate Commerce Commission alleging that on May 17th, 1942, while traveling as a first class passenger on the Southern Railway from Washington, D. C., to Atlanta, Georgia, that Railway subjected him to undue and unreasonable prejudice and disadvantage, in derogation of his rights under the Federal Constitution and the Interstate Commerce Act, (1) by providing insufficient tables and service for Negroes in its dining car; (2) by the use of a curtain around the tables allegedly reserved for Negroes; and (3) by giving preference and advantage to white persons, in that it failed and refused to serve plaintiff at tables in its dining car where there were empty seats, these tables and seats, although allegedly reserved for Negroes, being allowed to be used by white persons. The Commission was asked to require defendant to desist from such discrimination and in the future, to establish for the transportation of Negro interstate passengers over its lines equal and just dining car facilities, and such other services and facilities as the Commission might consider reasonable and just. Plaintiff also asked for damages by reason of the alleged discrimination.

After due hearing, on May 13th, 1944, Division No. 2 of the Commission rendered its report (258 I. C. C. 413) in which it found that while plaintiff had been subjected to undue and unreasonable prejudice and disadvantage, it, nevertheless, found that there was no basis for an award of damages by way of reparation, or necessity for an order for the future. The Commission said (258 I. C. C. 419): "As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad

judgment of an employee (The dining car Steward) of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining car service.

"* * * As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose." Accordingly, the Commission dismissed the complaint.

On appeal to this Court to set aside the action of the Commission, we held (Henderson *v.* United States, 63 F. Supp. 906) that while racial segregation of interstate passengers is not per se forbidden either by the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, the Commission, nevertheless, erred in holding that the Southern Railway's general practice, as evidenced by its then current dining car regulations or instructions, would result in no substantial inequality of treatment between Negro and other passengers seeking dining car service. We so found for the reasons as stated in our detailed opinion, as follows (63 F. Supp. 906 at 915-916): "In the case of the white passenger, he is merely required (by the Railway's dining car regulations) to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionallly reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eye of the law requires. None of the methods of segregation have been employed which have

heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of a car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

"We accept the Commission's construction of the supplemental regulation and its finding that the general practice thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But, nevertheless, in our opinion the regulation so construed, applied and practised, does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the segregation of white and colored passengers; nor do we think it unreasonable, in view of the recently prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers or, if none there, elsewhere in the dining car.

"The analogy of the Mitchell case is very close. There, Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at pages 96, 97, 61 S. Ct. 873, at page 877, 85 L. Ed. 1201): 'It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is

available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.'

* * * * * * *

" 'While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.'

"The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charges does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served on coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again the analogy to the Mitchell case is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches."

With respect to the requirement in the Southern Railway's then current dining car regulations that tables for Negro passengers be curtained, we found that this did not violate the rule of substantial racial equality, and stated that the method of carrying out the principle of racial segregation on interstate carriers was a matter for the Commission to determine. However, for the other reason just stated, by decree entered on February 15th, 1946, this

Court set aside the order of the Commission dismissing the complaint, and remanded the case to the Commission for further proceedings "in the light of the principles outlined" in our opinion. As a result, the Southern Railway thereupon issued, effective March 1st, 1946, the following new instructions for the regulation of its dining car service, canceling the instructions previously in effect:

"Subject: Segregation of White and Colored Passengers In Dining Cars.

To: Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A 'Reserved' card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules."

The Commission reopened the proceeding for further hearing; the Southern Railway presented additional evidence, and on September 5th, 1947, the Commission filed a report (two Commissioners dissenting in part) in which it affirmed its prior findings to the effect that whereas complainant had been subjected to undue and unreasonable prejudice and disadvantage on one particular occasion, no basis for an award of damages had been shown, and further

found that the new dining car regulations established by defendant, effective March 1st, 1946, and currently in force, which we have above quoted, were not in violation of Section 3 or any other provision of the Interstate Commerce Act. Accordingly, the Commission refused to enter an order for the future, and dismissed the complaint, whereupon the present suit was brought seeking to annul this latest action on the part of the Commission.

It will thus be seen that the precise question presented for decision is whether the Interstate Commerce Commission, by this second report and order, has fully complied with the direction given to it by this Court when we reversed the earlier action of the Commission, dismissing the complaint and remanded the proceeding to the Commission "for further proceedings in the light of the principles" set forth in our opinion.

The sum and substance of the Commission's position is that the same facts and issues are involved in this proceeding as in the previous one, with the exception of the Southern Railway's amended dining car regulations; that these amended regulations promulgated by the Railway as a result of our prior ruling, have removed the discrimination found by this Court to have been latent in the Railway's previous regulations, namely, that the Railway now provides adequately and reasonably for the equality of service and treatment of Negroes and whites as required by our decision. We quote the following from the Commission's report (269 I. C. C. 73 at —): "The current regulations were designed by the defendant to meet the Court's criticisms, of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has abolished its former practice, condemned by the court, of permitting white patrons to be seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for member of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no

circumstances are white passengers served in such space; nor are colored passenger served elsewhere in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

"Concerning the adequacy of the space reserved for Negro passengers, defendant's Superintendent of Dining Cars presented in evidence the results of two tests made under his direction and supervision showing the number of meals served to white and Negro patrons, respectively, in dining cars operated by defendant between Washington, D. C., and Atlanta, Ga. During the 11 days, May 14 to 24, 1945, a total of 37,615 meals were served, of which 446, or 1.19 per cent., were served to Negro civilians and 706, or 1.88 per cent., to Negroes in the miltary service. Of 20,789 meals served during the first 10 days of October, 1946, 723 or 3.48 per cent. of the total, were served to Negro civilians and 149, or 0.72 per cent., to Negro service people. It is defendant's practice to serve white and Negro soldiers together, without distinction. Under the current regulations setting apart four seats for Negroes, slightly more than 8 per cent. of the seating space in its dining cars is reserved unconditionally for the use of approximately 4 per cent. of the patrons. The capacity of the cars, now 48 seats, will be reduced to 44 seats as the offices for stewards are installed. A further fact disclosed by the described tests is that rarely is defendant requested to provide diner service for more than four Negroes at the same meal.

"As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 per cent. during the May, 1945 test period to 3.48 per cent. during the October, 1946, period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space."

With respect to the curtains separating the tables reserved for Negroes from the other tables, the Commission in its

report said (269 I. C. C. 73 at —): "At the time of the further hearing, the defendant had removed the curtains from one of its dining cars and had constructed in their stead permanent wood partitions approximately 5 feet high extending from the sides of the car to the aisle. The table which formerly occupied the space opposite the one now reserved exclusively for colored passengers, as described in rule (1) of the foregoing regulations, has been removed and the space is utilized as an office for the steward. That position affords the best view of the entire car, including the entrance to the kitchen and pantry and from it the steward can best supervise the service. As its dining cars are sent to the shops for repairs in the future, it is defendant's intention to make similar structural changes in all of them.

The case is before us on the testimony presented to the Commission. The correctness of its factual analysis of this testimony as contained in its report is not questioned. Thus, it will be seen that the Railway's amended dining car regulations, contrary to the prior regulations, require the setting aside of a table, seating four persons, exclusively for the use of Negro passengers. Also, the uncontradicted evidence presented to the Commission shows that up to the date of the Commission's decision the number of Negro passengers seeking dining car service rarely if ever exceeded that number on any one trip. Should that happen, however, the situation would be no different from those instances not infrequently occurring in interstate railroad transportation, where more white passengers seek dining car service than can be seated at one time. In short, the new regulations, the Commission found, are designed to take into account, with all due regard to the density of Negro travel requiring dining car service, the probability that a Negro passenger may not desire a meal as soon as he boards the train, or that he may board the train at an intermediate point after the dining car service has been begun, and may desire at that time or later to be served in the dining car.

Next, as concerns the matter of curtains separating Negro dining car patrons from the white patrons, in our

prior opinion we stated (63 F. Supp. 906 at 916) that "Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine." As above explained, the Railway Company is now in the process of abandoning the use of curtains as a means of separating the tables and, in their stead, is construeting in its dining cars permanent, wooden partitions, approximately five feet high, extending from the side of the car to the aisle.. Also, it is removing from all of its dining cars the table which had formerly occupied the space directly opposite the table now exclusively reserved for colored passengers, and this space is being utilized as an office for the dining car steward. As also explained in its report, the Commission, in Mays vs. Southern Railway Company, 268 I. C. C. 352, decided April 8, 1947, had before it this same question, under precisely the same dining car regulations as those now before us, and found that there was no basis for holding this manner of separation of the different tables to be a forbidden discrimination.

We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the kitchen end of the dining car, directly opposite the space newly provided for the stewards office. The undesirability of this location compared with that of tables in other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, non-existent. Therefore, it necessarily follows that this present complaint must be dismissed unless the Supreme Court has, in some decision

or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation.

We turn then to a consideration of whether any pertinent decisions have been rendered by the Supreme Court subsequent to our earlier decision. We find only two cases, namely, Morgan vs. Virginia, 328 U. S. 373, and Bob-Lo Excursion Co. vs. Michigan, 333 U. S. 28, sufficiently related to invite attention. At the time of our previous opinion the Morgan case had been decided by the Supreme Court of Appeals of Virginia, 184 Va. 24, but the appeal therein to the Supreme Court was still undecided. As pointed out in our previous opinion, that case involved the validity of a Virginia statute and State court action to enforce the same, and did not involve, as does the case here, the validity of the regulations of a common carrier. The Supreme Court reversed the State Court and held unconstitutional, as a burden on interstate commerce, the Virginia statute which required separation of the races in motor buses. This requirement was described by the Supreme Court in its opinion as follows (328 U. S. 373 at 361): "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort or convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey."

In our consideration of the Morgan case in our earlier opinion, as that case then stood, we stated (63 F. Supp. 906 at 913-914) that "it is not necessary to approach the present case from this aspect (the fact that Virginia's segrega-

tion laws were applicable alike to interstate as well as intrastate rail transportation) because as we have said, *the real question before us us is not one of segregation, but of equality of treatment.* Furthermore, the Commission in its opinion does not rely upon State statutes or decisions; and likewise, the Railway Company does not rely on them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case, because it does not, at least in terms purport to embrace dining car service. * * *" Then, after quoting the Virginia statute, we said: "Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case because nothing short of race segregation in separate cars, or in compartments 'divided by a good and substantial partition, with a door therein,' would satisfy those provisions."

That the Supreme Court in the Morgan case very definitely recognized the distinction between the two types of cases, namely those involving the validity of a State statute and those involving the rule of a carrier requiring segregation of interstate passengers is indicated by the following footnote on page 377 of its opinion: "When passing upon the rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' Chiles vs. Chesapeake & Ohio R. R. Co., 218 U. S. 71, 75." See also Simmons vs. Atlantic Greyhound Corporation, 75 F. Supp. 166; Stamps vs. Louisville & Nashville Railroad Co., I. C. C. .

The Commission in its report now under review, clearly stated, we think the distinction between the two types of cases in the following language (269 I. C. C. 73 at —): "Defendant's dining car regulations apply only to service in dining cars which cars are not permittel to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing

State lines, a requirement of the Virginia statutes which the courts condemn as imposing an undue burden on interstate commerce."

We turn then to the only other case decided by the Supreme Court since our earlier opinion in this proceeding was rendered, which likewise appears pertinent but actually is not, to the present issue, namely Bob-Lo Excursion Company *vs.* Michigan, supra. There, it was decided that a Michigan statute prohibiting Negro segregation in all public service including transportation, was legally enforceable with respect to refusal of a Michigan corporation, engaged chiefly in the round-trip of passengers from Detroit to Bois Blanc Island, Canada, to sell a ticket to a Negro for transportation to the latter resort which was reserved for white people, because, although the Michigan corporation was engaged in foreign commerce, application of the Michigan law to appellant was held not to contravene the commerce clause of the Federal Constitution.

In its opinion in the Bob-Lo Excursion Company case, the Supreme Court distinguished Morgan *vs.* Virginia, supra, and Hall *vs.* Decuir, 95 U. S. 485, saying (333 U. S. 28 at 39-40): "The regulation of traffic along the Mississippi River, such as the Hall case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here."

The even more recent decisions of the Supreme Court involving deed covenants prohibiting sales of realty to Negroes, Shelley *vs.* Kraemer, — U. S. —; Hurd *vs.* Hodge, — U. S. —; McGhee *vs.* Sipes, — U. S. —, and Uricolo *vs.* Hodge, — U. S. —, obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden. On the contrary, they recognize the legality of agreements to this effect. They merely hold that such agreements, although lawful, are not enforceable by court process. Thus, they have no relation to the principles governing the conduct of interstate transportation by common carrier.

Reliance is also placed by counsel for plaintiff upon Matthews *vs.* Southern Railway Company, 157 F. (2d) 609. There, the only issue was the correctness of the trial judge's charge to the jury in a race separation case. The Court of Appeals for the District of Columbia, in a footnote reference to the Morgan case, said (page 610) it could see "no valid distinction between segregation in buses and in railroad cars." We believe that we have already addressed ourselves sufficiently to this point to indicate that, in our opinion, there *is* a very definite distinction from the aspect of dining car accommodations during railroad transportation.

To summarize and conclude: (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I. C. C. 73 at —): "'Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future.'" To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is *any* empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach,—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may

be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, *every* seat in the dining car may be occupied.

For the reason herein set forth the complaint must be dismissed.

I concur.

W. CALVIN CHESNUT,
U. S. District Judge.

APPENDIX "C"

SOPER, *Circuit Judge* (dissenting):

Insofar as the opinion of the court sustains the Railroad Company's dining car regulations on the ground that they made adequate provision for the number of Negro passengers likely to apply for service, I am constrained to dissent. The Railroad Company has found that less than 4 per cent of its dining car patrons are Negroes, and it reserves 8 per cent of the available space for their exclusive use. This arrangement on its face seems fair to the Negro race, but it is based on the erroneous assumption that the rights which the Fourteenth Amendment is designed to protect are racial rather than personal in their nature. The regulations set aside one table in the dining car exclusively for Negroes and ten tables exclusively for whites, and the result is that occasionally a member of one race is denied service which is then available to a member of the other. Whenever this occurs, the Railroad Company discriminates against one passenger in favor of another because of his race, and deprives him of equality of treatment, and it is no answer to say that the Railroad Company has taken reasonable precautions to prevent the occurrence. It is true that segregation of the races is lawful provided "substantial equality of treatment of persons traveling under like conditions" is accorded; but the right belongs to the individual and not to the race, and segregation must be abandoned, or at least temporarily suspended, whenever its enforcement deprives the individual of treatment equal to that accorded to any other person at the same time.

Segregation in railroad traffic may be maintained if there are sufficient accommodations for all; but a vacant seat may not be denied to a passenger simply because of his race. The decisions of the Supreme Court support this view. In McCabe *v.* A. T. & S. F. Ry. Co., 235 U. S. 151 (1914), the court upheld an Oklahoma statute which required the Railroad Company to provide separate but equal accommodations for the two races in intrastate railroad travel, but struck down a section of the Act which permitted the carrier to provide sleeping cars, dining car, or chair cars to be used exclusively by either white or Negro passengers, separately but not jointly. It is not questioned that the meaning of this provision was that the carrier might provide these cars for white persons but need not provide similar accommodations for Negroes, because there were not enough Negroes seeking these accommodations to warrant the expense of providing them. Justice Hughes, in holding this section unconstitutional, said: (pp. 161-2):

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon their being a reasonable demand therefor, but if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

It may be suggested that the McCabe case is distinguishable because in that case the Railroad Company made no provision for colored passengers desiring first class service, whereas the regulations under examination in the present case are designed to care for all colored passengers that may be reasonably expected to apply. The distinc-

tion, however, is one of degree and not of principle, for in both cases the arrangement is designed to take care of the demands of the race rather than those of the individual citizen. Moreover, in 1940, the Supreme Court in Mitchell v. United States, 313 U. S. 80, reiterated the ruling that constitutional rights are personal and not racial, in a case where the carrier contemplated the probability that Pullman service would be demanded by Negroes, but made insufficient provision to meet the demand. Whenever that occurred, the court said, the Railroad Company was required to abandon the policy of segregation and seat the colored passenger in the car ordinarily reserved for whites. It had been the practice of the Railroad Company to accommodate the occasional Negro applicant for a chair in a Pullman car by giving him a seat in a drawing room at the same rate as was charged for a seat in the body of the car, but to compel the passenger to take a place in an ordinary coach when no drawing room was available. Adopting the view of the Government which opposed the regulation, Chief Justice Hughes, speaking for the court, said: (pp. 96-7)

"The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.' And the Commission has recognized that inequality persists with respect to certain other facilities such as dining car and observation-parlor car accommodations.

"We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic.' But

the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. McCabe v. Atchison T. & S. F. Ry. Co., supra. While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. Id. See, also, Missouri ex rel. Gaines *v.* Canada, pp. 350, 351 (305 U. S. 337). And the Interstate Commerce Act expressly extends its prohibition to the subjecting of 'any particular person' to unreasonable discriminations."

The same principle was again approved by the Supreme Court in the recent case of Shelley *vs.* Kraemer, 68 S. Ct. 836, which dealt with the validity of restrictive covenants in deeds designed to exclude Negroes from the ownership or occupancy of real property. The court held that covenants of this nature are unenforceable and, pointing out that the constitutional rule of equality is personal, declared that the denial of such a right to a Negro is not validated by the denial of the right under like circumstances to a white person. Chief Justice Vinson said: (p. 846)

"Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or Federal, has been called upon to en-

force a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities".

The carrier in the pending case has undoubtedly made an earnest effort to meet the criticisms directed at its earlier regulation in the former opinion of this court, and consequently instances of discrimination on account of race are less likely to occur under the regulation now prevailing. Nevertheless that regulation must also be condemned because it occasionally permits discrimination against members of both races in the allotment of dining-room privileges; and the court should therefore hold that the practice of the carrier in segregating the races in its dining-cars must be suspended whenever its enforcement results in the denial to any individual of his constitutional right of equality of treatment.

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NO. 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and SOUTHERN RAILWAY COMPANY, *Appellees*.

On Appeal from the United States District Court for the District of Maryland.

BRIEF FOR ELMER W. HENDERSON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 25.

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and SOUTHERN RAILWAY COMPANY, *Appellees*.

On Appeal from the United States District Court for the District of Maryland.

BRIEF FOR ELMER W. HENDERSON.

OPINIONS BELOW.

The opinions of the United States District Court for the District of Maryland are reported in 63 F. Supp. 906 and 80 F. Supp. 32 and appear in the record at pages 63 and 248. The appellant prosecutes this appeal from the decree entered on October 28, 1949. Probable jurisdiction was noted March 14, 1949 (R. 278).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1253 of the Judicial Code, 28 U.S.C. Sec. 1253.

STATUTES.

The pertinent portions of the Interstate Commerce Act are reproduced in the Appendix hereto.

STATEMENT OF THE CASE.

On May 17, 1942, the appellant, a Negro first-class interstate passenger on a train operated by the Southern Railway Company, a common carrier subject to the provisions of the Interstate Commerce Act, proceeding from Washington, D.C. to Atlanta, Georgia, was refused service at the two tables allegedly reserved for Negro passengers in the dining car of said train. At the time the appellant first requested service there were vacant seats at the tables allegedly reserved for Negroes. The other seats at these two tables were occupied by white passengers. There were vacant seats at other tables in the dining car, during the period when the appellant requested service. Appellant was refused service at the vacant seats at the tables allegedly reserved for colored passengers, although white passengers were continuously seated and served as vacancies occurred. He and other Negro passengers were not permitted to be seated and served at any other table in the dining car when there was a vacancy. As a result, he was never seated or served.

The Interstate Commerce Commission found that the appellant was subjected to undue and unreasonable prejudice and discrimination, concluded that the entry of an order for the future would serve no useful purpose, and dismissed the complaint.

The District Court for the District of Maryland set aside the order of the Commission and remanded the case, holding that racial segregation of interstate passengers is not *per se* forbidden by the Constitution, the Interstate Commerce Act or any other act of Congress; that the regulation, although not promulgated by the Interstate Commerce Commission, was directly approved by it, as a result of its

decision and order, and, for the purposes of the case, is treated as, in effect, the Commission's rule; that the Commission's finding of a violation of section 3(1) of the Act is correct; that the Commission erred in holding that "the defendant's practice as evidenced by its current instructions will result in no substantial inequality of treatment as between Negro and other passengers seeking dining car service"; that the current regulation, as construed by the Commission, does not constitute equality of treatment, for "if white passengers are thus seated at tables reserved for colored passengers, equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers or if none, then elsewhere in the dining car". On February 8, 1946 the case was remanded to the Commission for further hearing. (R. 79).

Subsequently the Southern Railway promulgated new regulations (R. 233) reserving one table exclusively for colored passengers and the remaining tables exclusively for white passengers. This table is located next to the kitchen, opposite the steward's office, and is separated from the body of the dining car by a five foot wooden partition. On rehearing, the Commission found that the carrier's rules, based on the volume of traffic, "provided an equitable and reasonable division between the races of its available dining car space" (R. 9); that the current regulation is not shown to be violative of section 3, or of any other provision of the act (R. 10); that an order for the future is not necessary; and by its order of September 5, 1947, dismissed the complaint. An appeal from this order was taken to the District Court of the United States for the District of Maryland, which Court on October 28, 1948 dismissed the appeal. It is from this decree that the present appeal is taken.

ASSIGNED ERRORS RELIED UPON.

The United States District Court for the District of Maryland erred:

1. In approving the Commission's findings and conclusions that the carrier's regulations provided an equitable division between the races according to their numbers of the available dining car space and does not violate any section of the Interstate Commerce Act. (Assignment of Errors Nos. 2, 3 and 6, (R. 267)).

2. In concluding that the current amended carrier regulation is not discriminatory as to Negro interstate passengers and affords equality of treatment to each individual passenger, notwithstanding, in its application, any passenger may be refused available accomodations solely because of his race. (Assignment of Errors Nos. 5, 7, 8, 13, 15 and 21, (R. 267-268)).

3. In concluding that racial segregation of interstate passengers by a carrier subject to the Interstate Commerce Act is permissible under the Act, the Constitution of the United States and laws of the United States, as interpreted by this Court. (Assignment of Errors Nos. 3, 10, 11, 14, and 25, (R. 267-269)).

4. In failing to hold that segregation of interstate passengers, by a carrier subject to the Interstate Commerce Act, is a violation of rights of passengers protected by the Interstate Commerce Act, the Constitution, and laws of the United States. (Assignment of Errors Nos. 19, 20, 22, and 23, (R. 268)).

5. In failing to hold that failure of the Commission to declare the regulation a violation of the Interstate Commerce Act and to forbid its enforcement in the future is a violation of the Interstate Commerce Act, and the 5th Amendment to the Constitution and is contrary to the national transportation policy of the United States and the

public policy of the United States against discriminations and distinctions based solely on race or color. (Assignment of Errors Nos. 12, 17, 18, 24, 26, 27, 28, and 16, (R. 268-269)).

QUESTIONS PRESENTED.

1. Whether an interstate carrier regulation requiring segregation of passengers, solely according to race or color, violates the Interstate Commerce Act.

2. Whether failure of the Commission to declare the regulation unlawful and to forbid its enforcement in the future and dismissal of the complaint by the Commission and Court below:

(1) violate the Fifth Amendment to the Constitution,

(2) are contrary to the national transportation policy of the United States and are contrary to the public policy of the United States.

3. Whether segregation solely according to race is discrimination, in violation of the Interstate Commerce Act and the Constitution of the United States.

SUMMARY OF ARGUMENT.

Freedom from distinction based solely on race or color is a fundamental right inherent in the concept of liberty, as expressed in the 5th and 14th Amendments to the Constitution. An interstate carrier, subject to the provisions of the Interstate Commerce Act, is under a duty at least as exacting as that of a state to respect this immunity and has no right to limit passenger's freedom of choice of dining car accommodations and of association solely on the basis of race or color. The enforced separation of Negro passengers from all other passengers is unjust discrimination and refusal of service to any passenger at any vacant seat, solely because of his race or color, is inequal-

ity of treatment, notwithstanding it is indiscriminately imposed, in violation of section 3(1) of the Interstate Commerce Act. Enforced racial segregation of passengers by carrier regulation does not promote the comfort and convenience of passengers and cannot be justified as an attempt to preserve peace and good order. Race or color is an invalid basis of classification of passengers and a carrier regulation differentiating in facilities provided passengers solely according to their race is unreasonable on its face and in its application, in violation of section 1(4) of the Act.

The ruling of the Interstate Commerce Commission is based on testimony concerning volume of traffic, by race of passengers, which was irrelevant to the issue of the personal rights of the appellant to be accommodated without discrimination or distinction solely because of his race or color. The long-continued practice of the Commission has been approval of racial segregation by interstate carrier regulation although the Act confers no power upon a carrier to differentiate between its passengers solely because of race. By its action, the Commission has sanctioned the carrier's practice and has enforced a substantive rule of statutory interpretation which makes race or color the sole controlling factor in its application. The Commission has the power to prohibit racial segregation of passengers by interstate carriers notwithstanding this is one practice not specifically forbidden by Interstate Commerce Act.

In failing to order the carrier to cease and desist the enforcement of its regulation, it has failed to perform its duty under the Act and the Constitution, to protect the statutory and constitutional personal rights of passengers, in violation of the due process clause of the 5th Amendment. There is a public interest, over and above that of the appellant, in the removal of racial distinctions and discriminations by the Commission, as an agency of the Federal government, in a matter under its supervision and control.

The decision of the Commission and the court below were based on the erroneous assumption that racial segregation is not a violation of the Interstate Commerce Act or the Constitution. The Commission relied on *Chiles* v. *Chesapeake and Ohio Ry. Co.*, decided prior to the Interstate Commerce Act, which held that an interstate carrier regulation requiring racial segregation of passengers was reasonable, if tested by custom, usage, and tradition, the test employed to determine the reasonableness of a statute applicable to intrastate passengers in *Plessy* v. *Ferguson*. Whether the Court, in *Plessy* v. *Ferguson* considered racial segregation permissible and reasonable under the due process or the equal protection clause of the 14th Amendment, the error of its ruling is plain when considered in the light of subsequent decisions in which the Court has ruled that race or color bears no reasonable relation to any permissible governmental end and cannot be made the basis of classification of persons. These cases cannot be reconciled with subsequent decisions and insofar as they are applicable to this case, should be re-examined and overruled.

Segregation is discrimination, not only because inequality invariably accompanies segregation but because of the very idea of separateness. Separateness through enforced segregation destroys for millions of Americans their moral stamina and their faith in the American ideal because it is antithetical to the basic concepts of life, liberty, and the pursuit of happiness.

Racial segregation of interstate passengers enforced by states is unconstitutional under the commerce clause of the Constitution which requires a uniform rule for seating arrangements in interstate commerce. Enforced racial segregation by carrier regulation is contrary to the national transportation policy of the United States and since states cannot regulate the subject and Congress has not acted, a privately owned public carrier should not be permitted to regulate a matter when only Congress is authorized and competent to act.

ARGUMENT.

I. Freedom From Distinctions Based Solely on Race or Color is a Right Protected by the Constitution of the United States and the Interstate Commerce Act.

A. The nature of the right.

The Declaration of Independence states "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness". It has been said that the Constitution is the body and letter of this declaration of principles and it is in its thought and spirit that the Constitution should be read. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150. In the American concept of democracy we cherish and foster individual freedom and human dignity, and we emphasize opportunity for each man according to his ability, regardless of national origin, religious belief, the size of his purse, or the color of his skin. These we consider to be arbitrary factors of no significance in a nation in which we express our pride as the melting pot of the world.

Our Constitution guarantees that each individual shall enjoy liberty and that no government shall deprive him of that liberty without due process of law. Though no attempt has been made to define the freedoms and immunities implicit in this concept, this Court has said:[1]

> The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which

[1] *Allgeyer* v. *Louisiana*, 165 U. S. 578.

> may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

In the American heritage, which emphasizes individual freedom and seeks a warrant for its expression rather than a justification of its limitation, the concept of "liberty" as it appears in the 5th and 14th amendments should be given the broadest scope. It has been said:[2]

> The liberty of which the 14th Amendment forbids a state from depriving anyone without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words "life, liberty, or property" in the 14th Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of due process of law.

The liberties protected by the due process clause of the 5th and 14th Amendments are, of course, not entirely unrestrained. Liberty of action and expression is not unlimited. Even the fundamental freedoms of speech, press and religion are subject to curtailment when exercised beyond the boundaries of peaceful expression, by violence, to injure others, or to threaten opposition to our government and hamper its operations in time of war. Liberty of action is sometimes of necessity subject to restraints required for the protection of society.[3] Where a wide variety of rights have been asserted and the restraint challenged as a deprivation of liberty under the due process clause, the statutes were held justified because their purpose was considered essential to the public safety, health, morals, peace

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[2] Justice Harlan, dissenting in *Taylor* v. *Beckham*, 178 U. S. 548.

[3] For example, statutes have been upheld, as a valid exercise of police power, which imposed certain conditions to be complied with before the issuance of a liquor license, *Crowley* v. *Christensen*, 137 U. S. 86, which prohibited the transportation of lottery tickets in interstate commerce, *Champion* v. *Ames*, 188 U. S. 321, and which required persons to submit to vaccination, *Jacobson* v. *Commonwealth of Massachusetts*, 197 U. S. 11.

or prosperity, and the exercise of the liberty of action asserted was contrary to that interest sought to be protected.

On the other hand, prohibitory legislation has repeatedly been held a denial of due process of law because unnecessary, where the denial of liberty involved was that of engaging in a particular business;[4] teaching a foreign language:[5] the right of "parents and guardians to direct the upbringing and education of children under their control", in schools of their own choice,[6] and to direct that education with "reasonable choice and discretion in respect of teachers, curriculum and text-books;[7] the right of children to "obtain instruction deemed valuable by their parents and which is obviously not in conflict with any public interest";[8] the right of aliens to work without restrictions on the number an employer may hire;[9] to make and perform contracts;[10] and to maintain business books in one's native language.[11] These merely suggest the wide scope of rights embraced within the meaning of liberty secured by these amendments. This Court has said:[11a]

> Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. *It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.* [Emphasis added.]

Restraints imposed upon freedom of choice of accommodations solely upon the basis of race or color are in no sense essential to the equal enjoyment of the right of choice of any other passenger. To afford a Negro passenger the right to sit at any available table of his choice hampers the

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4 *Adams* v. *Tanner*, 244 U. S. 590.
5 *Meyer* v. *Nebraska*, 262 U. S. 390, 391.
6 *Pierce* v. *Society of Sisters of the Holy Names*, 268 U. S. 534.
7 *Farrington* v. *Tokushige*, 273 U. S. 234, 298.
8 *Ibid.*
9 *Truax* v. *Raich*, 239 U. S. 33, 41.
10 *Allgeyer* v. *U. S.*, 165 U. S. 578.
11 *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525.
11a *Crowley* v. *Christensen*, 137 U. S. 86.

right of choice of a white passenger no more than the competing right of other passengers of his race seeking service at the same time. The only condition essential to the equal enjoyment of the same right of choice by each passenger is that each shall await his turn and be served in that order. All that any passenger can require is that he be allowed to assert the right. That his prejudice toward the race of his fellow diners may hinder a passenger's enjoyment psychologically is immaterial. The point is that each passenger is entitled to diner service on a basis of indiscriminate equality without distinction as to race or color. The right here asserted is not that of "dictating" the particular seat or section where a passenger shall be served, as the Commission says no passenger has the right to do. *Brown* v. *Atlantic Coast Line Ry. Co.*, 256 I. C. C. 681, 692. Nor is the right involved "in its essence a social question" as the Commission views it. *Ibid.* at 695. There are, of course, privileges which may be accorded at the absolute whim of members of a social group. The carrier, however, is no social arbiter. Factors forming the basis for creation of social groups bear no relation to the use of carrier facilities in common by the public. Whether a passenger wishes to dine at the same table with a person who is not acceptable to him socially is a matter purely personal to him, and he is free to decline to do so. But, unlike his personal prerogative in private social groups, no passenger has the right to dictate with whom he will share public facilities, no more than he has a right to demand that others be deprived of their constitutional rights. *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

There is a right, social in nature, involved, however, in the enforcement of a rule which requires that passengers be served separately according to their race or color. In our democratic society each individual has, and must have, the right to choose his friends and to determine the course of his personal and family life. Choice of those persons with whom an individual wishes to associate is his personal

privilege, which may be exercised freely with even the utmost unfounded prejudice. If, however, a passenger, other than a Negro, wishes to dine with a person of the Negro race, the carrier absolutely restricts that freedom of association. Instances are not unknown where persons related by blood or marriage have been denied service together because, in fact or in the opinion of the carrier's agents, they were of different color or racial identity. This limitation imposed on one's personal liberty, by a statute requiring racial segregation of intrastate passengers, was recognized by Mr. Justice Harlan, in his dissenting opinion in *Plessy v. Ferguson*, 163 U. S. 537, at p. 557:

> The fundamental objection therefore, to the statute, is that it interferes with the personal freedom of citizens. "Personal liberty", it has been well said, "consists in the power of changing situation, or removing one's person to whatever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Comm. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

Freedom from distinctions based solely on race, particularly from segregation according to race, by persons of all races, is a fundamental right inherent in the concept of "liberty", as expressed in the 5th and 14th Amendments as are other rights not specifically enumerated therein. Certain freedoms and immunities are protected from invasion by the federal government by the Bill of Rights and are likewise given protection against state action under the due process clause of the 14th Amendment, though no specific prohibition is therein expressed, because of their

"fundamental" nature.[12] Among these fundamental personal rights and "liberties" given this dual protection are freedom of speech and press;[13] freedom of religion;[14] freedom of assembly;[15] the right to counsel when charged with a serious crime, when necessary to an adequate defense;[16] the right of one accused of a crime to be informed of the charge;[17] the right to just compensation for private property taken by eminent domain;[18] freedom from self-incrimination through coerced confessions;[19] and from official threat of violence.[20]

The scope of the rights embraced within the freedoms given this protection, particularly those guaranteed by the First Amendment, has enlarged progressively as this Court has been called upon to decide whether a particular right asserted lies within the boundaries. Illustrative are the right to picket peacefully;[21] the right to distribute pamphlets and leaflets;[22] freedom from postal censorship;[23] the

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12 There is considerable authority for the view that these rights secured by the first eight amendments are protected against state action, not because of their nature, but because it was the intention of the framers of the 14th Amendment that the Bill of Rights be made applicable to state action. See dissenting opinion of Mr. Justice Black in *Adamson* v. *California*, 332 U. S. 46. Other rights conceived to be "fundamental" are the right of employees to organize and choose their representatives [*N. L. R. B.* v. *Jones and Laughlin S. Corp.*, 301 U. S. 1]; the normal right of employers to select and discharge employees [*Adair* v. *U. S.*, 208 U. S. 161]; the right of employers to hire persons without restriction as to their citizenship [*Truax* v. *Raich*, 239 U. S. 33]; the right of an employer to organize his business and select his officers and agents [*N. L. R. B.* v. *Jones and Laughlin S. Corp.*, *supra*]; and the right to equality of treatment under the Interstate Commerce Act [*Mitchell* v. *U. S.*, 313 U. S. 80].

13 *Gitlow* v. *N. Y.*, 268 U. S. 652; *Stromberg* v. *California*, 283 U. S. 359; *Grosjean* v. *American Press Co.*, 297 U. S. 333.

14 *W. Va. Board of Education* v. *Barnette*, 319 U. S. 624.

15 *DeJonge* v. *Oregon*, 299 U. S. 353; *Hague* v. *C. I. O.*, 307 U. S. 496.

16 *Uveges* v. *Commonwealth of Pennsylvania*, 335 U. S. 437.

17 *Snyder* v. *Massachusetts*, 291 U. S. 97.

18 *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226.

19 *Chambers* v. *Florida*, 309 U. S. 227.

20 *Brown* v. *Mississippi*, 297 U. S. 278.

21 *Thornhill* v. *Alabama*, 310 U. S. 88.

22 *Schneider* v. *State*, 308 U. S. 147; *Lovell* v. *Griffin*, 303 U. S. 444.

23 *Hannegan* v. *Esquire*, 327 U. S. 146.

right to use loudspeakers in a political campaign;[24] and the right to decline to give a flag salute.[25]

The latitude of action permissible in exercising the freedoms specifically guaranteed by the First Amendment indicates the scope of constitutional protection, for notwithstanding the Constitution does not spell out every right it protects, this Court has said it is particularly mindful it is "a constitution we are expounding".[26] Those constitutional provisions for the security of person and property are likewise to be liberally construed. *Boyd* v. *U. S.*, 116 U. S. 616.

Liberty of expression is abridged when its assertion in an appropriate place is denied "on the plea that it may be exercised in some other place". *Schneider* v. *State*, 308 U. S. 147, 163. Freedom of choice of accommodations is abridged when the choice is confined to one inferior table. Certainly it cannot be said that in the limited confines of a dining car, one table, set apart from the body of the car, for Negro passengers is the only appropriate place for them to dine. Freedom of discussion is considered so vital that the community cannot substitute its judgment for that of individual members of the community whether a message borne by another shall be received. *Martin* v. *City of Struthers*, 319 U. S. 141, 143. Many persons may be glad to receive it and the community must accord to each member "the full right to decide" whether he wishes to receive the visitor at his home. *Ibid.* No reason is perceived why a carrier may substitute its judgment for that of individual passengers as to the table at which he may dine and with which passengers he may be seated. Certainly full freedom of expression cannot exist when one is free to associate only with members of one's own race or color. A carrier should not be permitted to substitute its judgment for that of its passengers. It has no right, superior to that

[24] *Saia* v. *New York*, 334 U. S. 558.

[25] *West Va. Bd. of Education* v. *Barnette*, 319 U. S. 624.

[26] Mr. Justice Frankfurter, concurring opinion in *Adamson* v. *California*, 332 U. S. 46, 66.

of the passengers, to dictate that passengers of one race shall be accommodated at one segregated table and served only in the company of members of that race, while passengers of all other races may dine at any other table of their choice and with whom they please—except Negro passengers. A State may not confine Negro residents to areas where all or a majority of the other residents are Negroes, the only persons whom the State considers appropriate as neighbors. *Buchanan* v. *Warley*, 245 U. S. 60. Nor may a State or Federal judiciary enforce a private covenant expressing the judgment of individual persons that it is inappropriate or undesirable that Negroes purchase or occupy certain property in a particular area. *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24. Equality in the exercise of rights in real property is not afforded even where there exists the right of choice of some other property, which may be superior to the particular property desired. Equality is afforded only when any person has the right to choose a particular piece of property, to purchase, sell, or occupy as he sees fit, indiscriminately on the same basis with a person of another color. It is not the uniqueness of a particular piece of real property that is the controlling factor in the establishment of this principle. It is that race may not be made the basis for indiscriminate denial of the right of choice. Where even the controlling factor of race is absent, and an invasion of personal liberty is asserted, that right is so highly prized that stricter requirements of due process apply than when only property rights are concerned.[27] Equality of treatment is not achieved in the provision of separate facilities, however precisely duplicated. Declaring that passengers may use public facilities in common only with passengers of their race or color and confining Negro passengers to the use of inferior accommodations is a denial of equality of treatment notwithstanding the car-

[27] Mr. Justice Brandeis, concurring opinion in *St. Joseph Stock Yards* v. *U. S.*, 298 U. S. 38 at 77.

rier stands ready and does exclude all other passengers from the use of the table set aside for the exclusive use of Negro passengers. The inequality of treatment lies not only in the discrimination against Negro passengers—the intentional exclusion of persons of this race from the body of the car, to keep them to themselves, and placing them invariably at the most undesirable table. Denial of service to any passenger, whatever his race and solely because of his race, of available accommodations is discrimination. Equality of treatment, like equal protection of the laws, is not achieved when inequalities are indiscriminately imposed.

This Court has ruled that because of the nature of those rights guaranteed by the First Amendment and entitled to protection against both the federal and state governments, the burden rests upon the government to justify any invasion by a showing of clear and present danger. The sanction given them requires that the widest latitude of expression be given. They permit of no dubious intrusion: any impairment must be justified by the most compelling reasons. However subjective may be the process of determining the rights "implicit in the concept of ordered liberty and justice" and thus protected by the due process clause of the 5th and 14th Amendments, when the rights of minorities are concerned, whatever the *nature* of that right asserted, this Court has required the same showing of a weightier, countervailing public necessity to justify governmental action based solely on race, color, or national descent. In *Strauder* v. *W. Va.*, 100 U. S. 303, this Court stated (p. 306):

> The words of the [14th] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive *immunity* or right, most valuable to the colored race—*the right to exemption from unfriendly legislation against them distinctively as colored; exemption* from legal discriminations, implying infe-

riority in civil society lessening the security of their enjoyment of the rights which others enjoy. [Emphasis supplied.]

If race, color, or national descent under the 14th and 5th Amendments, is constitutionally a neutral, irrelevant factor, one possesses an *immunity* from distinctions based solely on race, color, or national descent and these alone cannot be made the basis of governmental action in the absence of some compelling paramount public necessity which requires the distinction be made in order to protect the security of all.

That this immunity exists but is often infringed seems to have been recognized by this Court. In full recognition of its judicial function, this Court has fulfilled the necessity of a searching, judicial scrutiny of governmental action, disclaimed in the economic realm, where the constitutionality of commercial regulation is presumed,[28] to determine, where rights of minorities are concerned, if those rights have been denied, not only in express terms, but in substance and effect. *U. S. v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4; *Oyama* v. *State of California*, 332 U. S. 633, 636; *Chambers* v. *State of Florida*, 309 U. S. 227. In the latter case, Mr. Justice Black, speaking for the Court, stated (p. 241): "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." As in the case of freedoms secured by the First and 14th Amendments, where the restriction must be affirmatively

[28] *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 190-191.

justified by a significant public interest threatened by clear and present danger,[29] *discriminations* against racial minorities can be excused only by the "most exceptional circumstances".[30] *Distinctions* between persons solely because of race, color, or national descent, "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality",[31] can be justified only by "pressing public necessity",[32] such as security measures in time of war.

Upon subjective evaluation, there are compelling reasons for the similarity in the showing required to justify a restraint on freedom from distinctions of race or color and those freedoms guaranteed by the First Amendment. As to the latter, decisions of this Court show that there is a national interest in the free expression of speech, press and religion, over and above the importance of the freedom of its exercise to the individual. This was recognized by Mr. Justice Brandeis, when, speaking of freedom of discussion in *Gilbert* v. *Minnesota*, 254 U. S. 325, he stated (pp. 337-8): "Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril". Eleven years later, Chief Justice Hughes, speaking for the Court, in *Stromberg* v. *California*, 283 U. S. 359, reiterated this principle, stating (p. 369): "The maintenance of opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic,

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29 *Thomas* v. *Collins*, 323 U. S. 516, 529.

30 *Oyama* v. *California*, *supra*, p. 646.

31 *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100.

32 *Korematsu* v. *U. S.*, 323 U. S. 214, 216.

is a fundamental principle of our constitutional system." The democratic process thrives only where citizens are free to criticize their government, by spoken and printed word, and to discuss grievances and proposed remedies. The same objective is sought to be attained in the field of religious expression according to one's personal beliefs. Thus a board of education may not compel a flag salute when it is contrary to one's religious views. This Court has said of such boards: "That they are educating the young for citizenship is reason for scrupulous protection of the Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes". *West Va. Bd. of Education* v. *Barnette*, 319 U. S. 624. Protection of the right herein asserted—freedom from distinctions solely because of one's race or color—is rooted in the same democratic principles. If men are created free and equal, each person must be guaranteed the opportunity to participate in the mainstream of community and national life. The measure of freedom of any people is that of those persons who labor under the greatest restraints, for as long as one man is not free, none is free. We believe the reason this immunity must be protected to ensure that important principles of our democratic society become living law, rather than "mere platitudes", is well stated in The Report of the President's Committee on Civil Rights: "To Secure These Rights", and it is to secure the right asserted that protection is here sought. The Report states (p. 4):

> THE IDEAL OF FREEDOM AND EQUALITY
>
> The central theme in our American heritage is the importance of the individual person. From the earliest moment of our history we have believed that every human being has an essential dignity and integrity which must be respected and safeguarded. Moreover, we believe that the welfare of the individual is the final goal of group life. Our American heritage fur-

ther teaches that to be secure in the rights he wishes for himself, each man must be willing to respect the rights of other men. This is the conscious recognition of a basic moral principle: all men are created equal as well as free. Stemming from this principle is the obligation to build social institutions that will guarantee equality of opportunity to all men. Without this equality freedom becomes an illusion. Thus the only aristocracy that is consistent with the free way of life is an aristocracy of talent and achievement. The grounds on which our society accords respect, influence or reward to each of its citizens must be limited to the quality of his personal character and of his social contribution.

This concept of equality which is so vital a part of the American heritage knows no kinship with notions of human uniformity or regimentation. We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if he has "*my* race, *my* religion, *my* political views, *my* social position." In our land men are equal, but they are free to be different. From these very differences among our people has come the great human and national strength of America.

Thus, the aspirations and achievements of each member of our society are to be limited only by the skills and energies he brings to the opportunities equally offered to all Americans. We can tolerate no restrictions upon the individual which depend upon irrelevant factors such as his race, his color, his religion or the social position to which he is born.

B. The duty of the carrier to protect this right.

Neither the Constitution nor the Interstate Commerce Act confers upon the carrier any right to differentiate between its passengers solely on the basis of race. On the contrary, whatever differentiation the carrier is permitted to make in facilities provided, based on relevant differences such as ability and willingness to pay, it cannot be said that Congress intended to authorize the carrier to discriminate or differentiate between its passengers on the

basis of race. The carrier is invested with a public interest and performs a public function. For this reason its rights and duties are subject to limitations not applicable to the acts of an individual. Instead, its property and the function it performs are so impressed with a public interest that it may not operate its business "as freely as a farmer does his farm". *Marsh* v. *Alabama*, 326 U. S. 501, 506. It is because of the public nature of and public interest in public carriers, bridges, turnpikes and even privately owned towns that subjects them to regulation in the interest of the public and "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Ibid.*

Under the Railway Labor Act the carrier cannot interfere with the liberty of its employees in selecting representatives of their own choice. *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S.S. Clerks*, 281 U. S. 548, 571. If the carrier cannot interfere with this "fundamental" right, it should not be permitted to interfere with passengers' freedom of selection of accommodations and infringe their immunity from distinctions based solely on race or color. The same act which confers upon a union the power to represent a craft and to make contracts as to wages, hours, and working conditions, also imposes upon it the duty not to discriminate against those for whom it acts. *Steele* v. *L. & N. Ry. Co.*, 323 U. S. 192, 202. In the exercise of this power it may consider differences between workers in seniority, the type of work and competence with which it is performed but it cannot differentiate between those whom it represents on the basis of race because, unlike those relevant differences mentioned, race alone is "obviously irrelevant and invidious". 323 U. S. at 203. A carrier may consider such relevant differences between passengers as ability and willingness to pay for accommodations in determining where they shall be seated

and may segregate a passenger because he has a contagious disease but, like a union, has no authority to promulgate regulations based solely on their race or color. A union exercising powers by virtue of a federal statute, as the carrier does by virtue of the Interstate Commerce Act, is held to "at least as exacting a duty to protect equally" those whose fundamental rights of employment it regulates as is imposed by the Constitution "upon a legislature to give equal protection to the interest of those for whom it legislates". *Ibid.* at 202. A carrier is likewise held to at least as exacting a duty in prescribing regulations affecting fundamental rights of passengers, under the Interstate Commerce Act. This Court has held that "denial of equality of accommodations" to a Negro passenger "because of his race would be an invasion of a fundamental individual right which is guaranfeed against state action by the Fourteenth Amendment" and "in view of the nature of the right" it is a denial by a carrier of equality of treatment under the Interstate Commerce Act. *Mitchell* v. *U. S.*, 313 U. S. 80, 94.

If the duty of a union under the Railway Labor Act or a carrier under the Interstate Commerce Act is equivalent to the duty of state under the 14th Amendment, each must respect the constitutional rights of those whose rights its action affects. See concurring opinion of Mr. Justice Murphy in *Steele* v. *L. & N. R. Co.*, *supra*, at p. 208. The powers of a carrier, at least, because of the nature of its business and the use of its property by the public, are circumscribed by the statutory and constitutional rights of its passengers. *Marsh* v. *Alabama*, 326 U. S. 501, 506. Whether a carrier's rights are circumscribed by all constitutional rights of its passengers, or only those according to their nature, it is clear that the carrier must provide equality of treatment to all. If equality of treatment is equivalent to equal protection of the laws, refusal of service to any passenger solely because of his race, is inequality of treatment, though indiscriminately imposed,

for equal protection of the laws is not satisfied when inequalities are indiscriminately imposed. *Shelley* v. *Kraemer*, 334 U. S. 1.

The carrier's practice is entirely voluntary. No state can compel it to segregate passengers according to race. *Morgan* v. *Virginia*, 328 U. S. 373. Certainly it could not seriously be urged that a statute requiring racial segregation which burdens commerce is nonetheless a reasonable exercise of state police power, especially when judged by such questionable criteria as the observable extent of racial differences, noted in *Plessy* v. *Ferguson*. The Carrier advances as its reason for the practice an attempt "to keep down friction" between the races (R. 167-169). This, in itself, is no justification for regulatory measures of the stature of legislative enactments, for "important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution". *Buchanan* v. *Warley*, 245 U. S. 80, 81. If the measure of duty of equality of treatment required of an interstate carrier is as exacting as that imposed upon a state, a carrier-made regulation, promulgated under the "convenient apologetics" of preservation of peace and good order which prescribes different treatment for passengers, solely according to their race or color, is a violation of that duty. Further, what is allowable in the reasonable exercise of state power may only suggest the minimum standard of conduct required of a carrier, and does not necessarily mark the limits of its duty, because of the sweeping prohibitions of the Interstate Commerce Act. Whether the carrier's duty extends to the protection of any constitutional rights, or only those rights of statutory creation, it has no right under the common law, the Constitution, or the Interstate Commerce Act, to differentiate in the facilities afforded for public use solely of the basis of race or color of its passengers.

II. Enforcement by An Interstate Carrier of Its Regulation Requiring Segregation of Passengers Solely According to Race or Color is a Violation of the Interstate Commerce Act.

A. The regulation violates Section 3(1) of the Act.

(1). *It unduly discriminates against particular persons.*

Over a period of years the Southern Railway has maintained a practice of segregating passengers according to race, which is enforced as to dining car service, here involved. In July 1941 its passenger department employees were instructed as follows:

> Dining Car Regulations
>
> Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartment set aside for them. (R. 66)

These instructions were supplemented on August 6, 1942, by the following, in effect at the time of the occurrence complained of:

> Effective at once please be governed by the following with respect to the race separation curtains in dining cars:
>
> Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.
>
> These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you. (R. 66-67)

The Commission's conclusion that the carrier's practice, as evidenced by the instructions foregoing would not "result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service" (R. 191) was held erroneous by the court below which ruled that substantial equality of treatment was not afforded to Negro passengers (R. 77). On rehearing, after remand, the carrier introduced in evidence the following regulation issued effective March 1, 1946:

To Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accomodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946. (R. 7)

Formerly Negro passengers were forced to wait until passengers of all other races applying for service had been accomodated. During the war, the increase in travel necessitated continuous use of the dining cars, with the result that it was necessary to serve Negro passengers at the same time other passengers were being served. The carrier then initiated the use of curtains to separate two tables, conditionally reserved for Negro passengers, from the rest of the diner (R. 166-167). Recently it has installed five-foot wooden partitions (apparently to comply with a Virginia statute[33] which requires a partition) separating one table reserved for Negro passengers from the rest of the car, opposite which, in place of the other table formerly reserved for Negro passengers, it has located the Steward's "office". (R. 199)

Negro passengers are the only passengers who are confined to service at one table, behind a wooden partition, roped off like a stall until its occupants enter. Negro passengers are the only group of passengers who are limited to four in number for service at the same time, notwithstanding every other seat in the diner may be vacant. Negro passengers are the only passengers who must always sit at one table, next to the kitchen, where Negro passengers are invariably compelled to sit, with its clatter and traffic, and opposite the steward's "office" where waiters gather for supervision and change-making at the cash register, all in the narrow confines of this area. Yet passengers of all other races have the freedom of choice of accommodations at any other available table in the dining car, without these discomforts. This privilege, denied to Ne-

[33] Code of Laws of Virginia (1904), Chap. 155, Sec. 3962 reads:

Separate Cars for White and Colored Passengers.

All persons natural or artificial, who are now, or may hereafter be, engaged in running or operating any railroad in this State by steam for transportation of passengers are hereby required to furnish separate cars or coaches for travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial partition, with a door therein, shall be deemed a separate coach and each separate coach or compartment shall bear in plain letters, indicating the race for which it is set apart.

groes solely because of their race, is enjoyed by all other persons, as until recently was the right of choice in housing accommodations by persons other than Negroes, "as a matter of course". *Shelley* v. *Kraemer*, 334 U. S. 1. This practice, which is unduly prejudicial and disadvantageous to Negro passengers in many respects, as indicated, is certainly embraced within the sweeping provisions of Section 3(1) which this court has said is intended "to secure equality of treatment to all and to prevent unjust discrimination and the language of the act is comprehensible enough to include every form of unjust discrimination." *Chesapeake and Ohio R.R. Co.* v. *U.S.*, 296 U.S. 187. Further and fundamentally more important, the carrier's practice of segregating passengers according to race has consistently been directed exclusively against particular persons —Negro passengers—notwithstanding Section 3(1) specifically states that it is unlawful for any common carrier subject to the Act "to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." In its regulations, the carrier successively refers to "passengers of different races" and to "white and colored passengers". Presumably passengers other than Negroes, such as Indians and Orientals are seated only at the segregated table, although this is highly unlikely. However, under the present regulation no passengers, white or colored—except Negroes—are forced to endure the humiliation, embarrassment and discrimination of being set off from fellow passengers as if they were inferior, loathesome untouchables and unfit to share public accommodations in the impersonal manner as other passengers. A single racial group is singled out for differentiation of treatment and, for this reason, the practice is "immediately suspect". *Korematsu* v. *U.S.*, 323 U.S. 214. We submit, therefore, that the carrier's practice, as evidenced on the face of its regulation and in its administration, is a denial of equality of treatment to Negro passengers and is unduly discriminatory in singling out these particular passengers for different treatment, solely because of their race.

(2) *The carrier's practice denies the personal fundamental right of equality of treatment of Negro and other passengers.*

Under the carrier's present regulation and practice 4 seats in the dining car are provided for Negro passengers and 40 for all other passengers. As shown by the carrier's testimony in the application of this regulation, no persons other than those identifying themselves as Negroes or so determined to be by the steward are permitted to be seated and served elsewhere in the dining car. Thus, if the reserved "Jim Crow" table is occupied, the 5th Negro is denied service, notwithstanding there may be vacant seats at other tables in the car. (R. 203) Likewise, the 41st passenger, other than a Negro, when all seats in the body of the car are occupied, will not be seated and served at a vacant seat at the reserved "Jim Crow" table. (R. 207)

In *Mitchell* v. *U.S.*, 313 U.S. 80, 97, in comparing equality of treatment under Section 3(1) of the act to that required of a state under the equal protection clause of the 14th amendment, the Court stressed the principle that "the essence of the constitutional right is that it is a personal one. It is the individual, we said, who is entitled to the equal protection of the laws—not merely a group of individuals, or a body of persons according to their numbers."

More recently, in *Shelley* v. *Kraemer*, 334 U.S. 1, in which it was urged that judicial enforcement of racial restrictive covenants was not a denial of equal protection of the laws because it applied equally to white and Negro persons, the Court ruled that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (P. 22)

The principle is applicable here. As shown above, instances may and do occur when a passenger may seek service but will be denied it even though there is a vacant seat. We believe the rule is correctly stated by Judge Soper, in the dissenting opinion below, that "a vacant seat may not

be denied to a passenger simply because of his race" (R. 264).

Appellant and other Negro passengers seek only the same treatment accorded all other passengers. Obviously no one can complain of a failure to be served when the diner is fully occupied but there is a significant difference between that situation and one where there are vacant seats and the carrier refuses to serve Negro passengers. The court below, however, failed to see that denial of service to any passenger solely because of his race "produces a result any more unjust or inequitable from a legal approach—which must be this Court's approach to the question—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables alloted to their respective races, because, for the time being, every seat in the dining car may be occupied" (R. 260). Failure to serve a passenger when there is no space available infringes no passenger's rights. Then every passenger must wait, regardless of his race, but failure to serve one passenger and compelling him to wait until a particular table is vacant, while serving others whom he preceded to the dining car at a table he is not permitted to occupy, is an invasion of his personal right to equality of treatment. If one passenger may enter the diner and be served immediately while another passenger must wait until a certain table is available, the latter is not accorded treatment equal to that given the passenger preferred. The discrimination in this undue preference, we submit, is obvious.

It is the steward's duty to assign passengers to the tables designated for use according to the race of each passenger. It is his duty to use reasonable care in ascertaining the race of each passenger in assigning passengers. *Nashville, C & S Ry. Co.* v. *Cathey*, 4 Tenn. Civ. App. 346. Although some method of identification must be employed, as in the case of a statute,[33a] inasmuch as the regulation gives no directions to the steward in the ascertainment of race or color, and since there is no ascertainable stand-

[33a] *Morgan* v. *Virginia*, 328 U. S. 373.

ard generally applicable or made for the purpose of the regulation, the determination of each passenger's race rests entirely within the discretion of the steward and conductor. No dining car steward or conductor is capable of determining race. That is the specialized function of anthropologists who do not rest their conclusions on appearance alone, and who are not in complete agreement. The most a steward can do is form his opinion of a passenger's racial identity. The discrimination possible under these conditions is obvious. And, as pointed out by Chairman Aitchison, in his dissenting-in-part opinion, "Discrimination and prejudice will be the result of the uncertain guide afforded by the quoted words" (R. 11). If he forms his opinion of a passenger's racial identity on the basis of the definitions prescribed by statutes, with which the regulation is intended to comply, conceivably he might resort to the statute of the state through which the train is then passing. This would require interrogation of the passenger as to his ancestry to determine if under the statutory definition he is a Negro or "colored", for the steward has no means at hand for otherwise securing these pertinent facts. If he rests his opinion on skin color and general appearance, Negroes not so identifiable will be permitted to sit at the superior tables. Instances where this has happened, even to the extent of separating related persons, are not unknown.

B. The carrier's regulation violates Section 1(4) of the Act.

(1) *The reason for the regulation.*

Under Section 1(4) of the Act, it is the carrier's "duty . . . to provide reasonable facilities for the operation of through routes and to make reasonable rules and regulations with respect to the operation of through routes . . ." This is declaratory of the common law right and duty of a carrier to promulgate reasonable regulations necessary to the performance of its duties to the traveling public with the highest degree of efficiency, with a view to conserving the convenience, comfort and safety of its passengers. *Pa.*

Ry. Co. v. *Puritan Coal Mining Co.*, 237 U.S. 121; *Capital Traction Co.* v. *Morgan*, 44 App. D.C. 237; *Castell* v. *American Airways*, 88 S.W. (2nd) 976.

One of the first considerations in determining the reasonableness of a regulation is the carrier's reason for its promulgation. The carrier's vice-president testified that it was necessary to segregate the races "due to the temperamental people of the South; to help keep down friction; to keep peace and good order; that the seating of white and colored passengers together by the steward would create discord, probably end in a race riot before it was all over; that Negro passengers have filed practically all the lawsuits for mistreatment; that there has been an increasing number of lawsuits by colored passengers involving dining car facilities, due principally to the fact that colored passengers have insisted on going into the white compartment of the cars in violation of the Jim Crow laws" (R. 168-171). On rehearing before the Commission, he testified, with respect to the current regulation that "we found that this would meet the requirements of all of the states in which we operate where the segregation laws are effective" (R. 202), and "This is assigned space, and it is equally assigned to meet the requirements of the segregation laws" (R. 205).

Contrary to this testimony that allowing passengers of different races and color to sit where they please in the dining car would "create discord" and "probably end in a race riot", the evidence in this case shows that in actual practice, when segregation has not been enforced, no trouble of any kind has resulted. One of the carrier's witnesses, who unlike the vice-president has observed personally the conduct of passengers in the dining car, testified that he had often served white and colored passengers at the segregated "Jim Crow" table at the same time (R. 145); that "Quite often white people come and sit down with colored people" (R. 147); that he has seen colored persons sit down at the table with white passengers and

also white passengers seat themselves with colored persons (R. 148-149); that when the curtain was in use on the diner and passengers of different races were seated and being served at this table, the steward did not pull the curtain (R. 146); that the curtain was not drawn when colored soldiers sat at the table (R. 152); that he had seen both white and colored passengers push back the separating curtain, and could not recall having seen the steward draw it after passengers had pushed it back (R. 152-153); and that when colored and white passengers seated themselves at one table and were served by him, nothing happened and the steward did not interfere. (R. 148)

Notwithstanding preservation of the peace and good order is the carrier's alleged reason for enforcing racial segregation, the real reason is, as one must honestly admit, to keep Negroes to themselves. Mr. Justice Harlan, in his dissenting opinion in *Plessy* v. *Ferguson*, 163 U. S. 537, pointedly stated:

> Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of La. did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

This Court on frequent occasions has summarily dismissed the argument that race friction makes it necessary to keep the races apart in order to preserve peace and good order. This objective, however desirable cannot be accomplished by enforced residential segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704. In

Oyama v. *California*, 332 U. S. 633, 650, Mr. Justice Black, in his concurring opinion spoke of the "uncompromising opposition of the Constitution to racism, whatever cloak or disguise it may assume." In the same case, Mr. Justice Murphy concurring stated at p. 663 that the Constitution "insists that government whether state or federal shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin, or the nature of his beliefs. It thus renders irrational as a justification of discrimination those factors which reflect social animosity."

(2) The regulation does not promote the comfort and convenience of passengers.

It has been held that the Interstate Commerce Act was enacted primarily, not for the benefit of the carrier, but to protect passengers. *Kentucky Bridge Co.* v. *Louisville R. Co.*, 37 F. 567; *Central R. Co. of N. J.* v. *Anchor Line*, 219 F. 716. The regulation here is, on the contrary, a burden on passengers and the carrier. In this case, as was the case in *Washington, B. & A. Electric Co.* v. *Waller*, 289 F. 598, there is no evidence that the regulation tends to promote the passengers' comfort, or preserve the public peace and good order. Nor is there any evidence that the regulation and practice were induced by the carrier's determination of the existence of such facts. On the contrary, the evidence shows no necessity to segregate passengers by race in order to keep the public peace. It shows that passengers of different races have voluntarily sat and eaten together but that the carrier's practice is to refuse service if there is no seat at a table at which the steward will assign the particular passenger. The fact shown that passengers have sat and eaten together without incident shows that they have no objection as to whom their fellow diners shall be, as indeed no passenger has a right to demand. These occurences can be enlarged. (R. 41-42.)

Notwithstanding passengers have seated themselves for service at any available seat, without regard to the race of fellow diners, the carrier's present practice is to refuse service in the diner to any passenger who applies at a time when all tables of those to which the steward will assign him are occupied. Denial of dining car service to any hungry passenger, when there is a vacant space, is of no benefit, comfort or convenience to him or to any other passenger, whatever his race, who is similarly treated.

There is no valid reason for the carrier's self-imposition of the practice of segregating passengers by race and the expense which it is incurring to install wooden partitions in each car. The result of this absurdity is that the carrier cannot make full use of facilities and passengers must ultimately bear the expense of a needless structure for which there has been no request and which is unwanted.

It is significant that Negroes have filed practically all suits against the carrier for mistreatment arising out of the enforcement of its regulations separating passengers by race. (R. 169) As far as it is ascertainable, every formal complaint filed with the Interstate Commerce Commission charging discrimination in dining car service has been filed by Negro passengers.[34] There have been presented to the Commission a considerable number of informal complaints and it is reasonable to assume that there are more Negro passengers whose rights have been infringed who have not complained.

The service provided Negro diners imposes discomforts, disadvantages, and inconveniences to which other passengers are not subjected. The present accommodations are more discriminatory than was the situation when

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[34] *Brown* v. *Atlantic C. L. Ry. Co.*, 256 I.C.C. 681; *Henderson* v. *Southern Ry.*, 258 I.C.C. 413; *LeFlore et al* v. *Gulf, Mobile & Ohio R. Co.*, 262 I.C.C. 403; *Barnett* v. *Texas & Pacific Ry. Co.*, 263 I.C.C. 171; *Mays* v. *Southern Ry. Co.*, 268 I.C.C. 352; *Byrd* v. *Seaboard Air Line R. Co.*, 269 I.C.C. 344; *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I.C.C. 399; *Stamps et al* v. *Louisville & N.R. Co.*, 269 I.C.C. 789.

the incident complained of occurred. At least under the former regulation, as construed by the Court below, a Negro passenger had the right to sit at any table in the dining car if the "reserved" table was occupied by persons of anothr race or color. (R. 77-78) Segregation is particularly a burden on Negro passengers. It often results in denial of service, and always means humiliation and embarrassment, the stigmatization of being classed as inferior and unfit to sit with passengers of other races. Segregation means for the Negro passenger, if he wishes to eat in the diner, submission to this degrading practice. Segregation means that Negro passengers, who are able, are forced to expend time and money to complain to the Interstate Commerce Commission, to file suits against the carriers, to wage the battle to enforce a simple, fundamental right. It is a well known fact, at least among Negroes, that Negroes avoid travel by public carrier when they have reason to believe that they will be segregated because of their race. This practice, rather than stimulating the free flow of interstate commerce, is a definite deterrent to travel by these American citizens.

The burden and unreasonableness of segregation is apparent when one realizes the possible results of the enforcement of the carrier's regulation. If any passenger, of any race, insists on being seated and served at a table other than that to which the steward assigns him, upon the steward's determination of his race, the conductor, who has the authority of a peace officer at common law and under statutes of states in which the carrier operates (Code of Alabama, 1940, Title 48, sec. 198; Fla. Stats. Ann. sec. 352.02; Georgia Code Ann. sec. 27-213; North Carolina Gen. Stats., art. 10, sec. 60-82), can eject him from the train and thus totally deprive the passenger of dining car service and carriage. Put more forcibly, the carrier's agent has the authority to say, "You are a Negro (or white)

person and you may not be served at this table where only white (or Negro) passengers may sit and be served. If you insist on remaining here, you will not be served and I will arrest you, remove you from this train, and place you in the custody of the local police authorities." It is likely, however, that the language will be more forceful and vehement.

It is further significant that in several instances when Negro passengers have refused to move at the direction of the carrier's agent from a seat of their selection to another set aside for Negro passengers, in violation of a carrier regulation, they have actually been remitted to the custody of state officers, and charged with the convenient criminal offense of "disorderly conduct", though there is serious doubt whether the offense was committed.[34a]

[34a] In *Taylor* v. *Commonwealth of Virginia*, 187 Va. 214, a Negro passenger was convicted by the trial court of disorderly conduct under the Virginia Code, Section 4533-a which makes it a crime for any person "to be disorderly on a bus . . . by failing to move to another seat when lawfully requested to do so by the operator . . ." The judgment of conviction was reversed on appeal, however, on the ground that his conduct was "morally beyond reproach" and not actually disorderly. In *Lee* v. *Commonwealth of Virginia*, ... So. ....., a Negro passenger was convicted of disorderly conduct for refusal to move to the rear portion of a rail coach reserved for Negro passengers. This case is on appeal to the Supreme Court of Virginia, which, as of this date, has not rendered its opinion. When Negro passengers have been ejected from public carrier or left, under protest, because they refused to move to a seat designated for Negroes, no redress has been available by way of a civil action for damages for false arrest, unlawful ejection, or malicious prosecution. In *Simmons* v. *Atlantic Greyhound Corp.*, 75 F. Supp. 166, a Negro passenger who upon his refusal to move to a rear seat in a bus was asked to leave the bus, and did so, under protest, was denied recovery on the ground that the carrier regulation requiring racial segregation was valid. *Kinchlow* v. *Peoples Transit Co.*, 88 F. (2d) 764 illustrates consequences which may follow from refusal of a Negro passenger to change seats at the driver's direction. There a Virginia statute (Sec. 4097bb of the Va. Code of 1930) gave the motor vehicle operator the right to require a passenger to change his or her seat to maintain racial segregation. Upon the passenger's refusal, the driver summoned the Virginia police who, after the passenger's repeated refusal to change her seat, arrested her, removed her from the bus and charged her with disorderly conduct of which she was convicted. The court found in this case that the passenger actually was guilty of disorderly conduct; that the validity of the statute requiring segregation was not decisive of the issue; and that since the ejection and arrest were made by the policemen under the statute requiring racial segregation there was no showing of unlawful conduct by the driver and no recovery allowable. *Day* v. *Atlantic Greyhound Corp.*, 171 F. (2d) 49, followed the ruling in the Simmons case, denying recovery for ejection from a bus on the ground that the interstate carrier's regulation was valid.

(3) Race of passengers is invalid as the sole basis of classification.

The carrier's regulations refer to "white" and "colored" and the current, amended regulation to "white" and "Negro" passengers. Nowhere does it appear that criteria the carrier, or its agents, utilizes for these classifications. It admits it "had in mind" the regulation "would meet the requirements of all the southern states in which we operate where the segregation laws are effective" (R. 202). In the statutes of these states, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Tennessee, and Kentucky, definitions of "White", "colored", and "Negro" vary infinitely as was pointed out by the Court in *Morgan* v. *Virginia*, 328 U. S. 373, wherein the Court stated (pp. 382-3):

> Any ascertainable Negro blood identifies a person as colored for purposes of separation in some states. In the other states which require the separation of races on motor carriers, apparently no definition generally applicable or made for the purpose of the statute is given. Court definitions would be required to clarify the line between the races. Obviously there may be changes by legislation in the definition.

This wide variance in definition, in attempt to determine "Who is a Negro?" is understandable inasmuch as anthropologists and others who have given much study to the problem are not in agreement.[34b] If a carrier is permitted to require separation of races some method of identification of who is a Negro and who is white must be employed, as where racial segregation is required by statute. At least the statutes attempted some definitions, but so varying that the confusion arising from their application unduly burdened commerce. In the case of the carrier regulation, herein, there is no definition generally appli-

[34b] Benedict, Ruth, "Race: Science and Politics" (1943); Klineberg, Otto, "Race Differences" (1935); Boaz, Franz, "Race and Democratic Society" (1945).

cable nor has any been made for the purpose of regulation. Certainly it is not within the competency of a public carrier to make such definitions if it should try. In view of the possible consequences which might follow as a result of error or disagreement in a passenger's racial identification it would seem that like a penal statute, the regulation should "be couched in terms that are not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" so that no "prophetic understanding" is required by those who enforce it and those against whom it is enforced. *Whitney* v. *People of State of California*, 274 U. S. 357.

III. Failure of the Commission to Declare Racial Segregation by Carrier Regulation a Violation of the Interstate Commerce Act and to Forbid Its Enforcement in the Future and Dismissal of the Complaint by the Commission and the Court:

A. Violate the Fifth Amendment.

In reaching its conclusion the Commission relied on testimony irrelevant to the issue of the personal right of the appellant to be accommodated without discrimination or distinction on account of race or color. Over the objections of appellant's counsel (R. 215-6), the carrier was permitted to introduce in evidence the results of two tests showing the number of meals served to white and Negro passengers, respectively. After consideration of this testimony, the Commission concluded:

> The ratio of meals served Negro civilians to the total number served all patrons increased from 1.19 percent during the May 1945 test period to 3.48 percent during the October 1946 period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that the defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space. (R. 9)

This division of accommodations between passengers according to race is clearly intended to provide accommodations for two bodies or groups of persons—white and Negro—according to their numbers, rather than to furnish available accommodations to individual passengers in turn as they present themselves for service. The number of seats provided for each group, even if the entire dining car is reserved exclusively at times for either group, is immaterial if any passenger is refused service solely because of race. If the facilities are available and unoccupied, each individual passenger is entitled to be accommodated at the time service is requested, regardless of the race of other passengers then being served and at any particular table when there is a vacancy.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, this Court said:

> The argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

This principle was reaffirmed in the case of *Mitchell* v. *United States*, 313 U.S. 80. There an interstate carrier denied a Negro passenger available first-class accommodations in a Pullman car, inasmuch as the drawing room, customarily reserved for Negro passengers at reduced rates,

was then occupied. The Commission ruled that the carrier's refusal to accommodate the complainant was not unjust or undue discrimination, under the Interstate Commerce Act, because of the "comparatively little colored traffic." To this, the Court replied:

> We take it that the chief reason for the Commission's action was the "comparatively little colored traffic." But the comparative volume of traffic cannot justify the denial of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe* v. *Atchison, Topeka & Santa Fe Rwy. Co., supra.* While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. *It is the individual, we said, who is entitled to the equal protection of the laws, not merely a group of individuals, or a body of persons according to their numbers.* Id. See also *Missouri ex rel Gaines* v. *Canada*, 305 U.S. pages 350, 351; 59 S. Ct. 236, 237; 83 L. Ed. 208. And the Interstate Commerce Act expressly extends its prohibitions to the subjection of "any particular person to unreasonable discriminations." (Italics supplied.)

The testimony as to volume of traffic, apart from its competence and reliability, could not legally have influenced the Commission's decision. Because it was accepted and considered by the Commission as an important factor in reaching its conclusion, the order should be set aside. *Southern Pacific R. Co.* v. *St. Louis Hay and Grain Co.*, 214 U.S. 297; *Florida East Coast R.* v. *U.S.*, 234 U.S. 167; *cf. St. Joseph Stock Yard Co.* v. *U.S.*, 298 U.S. 38.

The Commission ruled that the Interstate Commerce Act neither requires nor prohibits segregation of passengers by

race.[35] Its long-continued practice, however, has been approval of racial segregation, commencing with its decision in 1887, in *Council v. Western & Atlantic R. Co.*, 1 I.C.C. Reports 638. In that case a Negro passenger was directed to move to another car. He refused to do so except under the direction of the conductor, who stood by. He was forcibly ejected and finally removed to another car, as a result of which he was injured. In deciding "whether railroad companies may lawfully separate their white and colored passengers by providing cars for each," the Commission concluded that, under the act, this is a permissible practice. It reasoned as follows:

> It is both the right and duty of railroad companies to make such reasonable regulations as will secure order and promote the comfort of their passengers. In the exercise of this right and the performance of this duty, carriers have established separate cars for ladies, and for gentlemen accompanied by ladies, and the right to make such rules as to sexes is nowhere questioned. A man, white or colored, excluded from the ladies' car by such rule could hardly claim successfully under the Act to Regulate Commerce that he had been subjected to unjust discrimination and unreasonable prejudice or disadvantage because of a custom of the railroad companies in the state where the defendant's railroad is located, and in all the other states where the colored population is considerable to provide separate cars for the exclusive use of colored and of white people.
>
> In Pennsylvania, where, by regulation, separate seats were provided, a colored woman refused to occupy the seat assigned to her; she was put off the car, and the supreme court of the state in that case declared the separation of white and colored passengers in public conveyances to be a subject of sound regulation to secure order, promote comfort, preserve peace, and maintain the rights of both carriers and passengers. In a later case in Illinois the supreme court held that public carriers have no right to discriminate between passengers on account of color until they do furnish separate

[35] Apparently, it is of the view that it has no power to forbid segregation according to statement of its counsel (R. 190).

seats equal in comfort and safety to those furnished to other travelers, the obvious meaning of which is that to furnish separate seats equal in comfort and safety is not unjust discrimination.

These interpretations of the law are in conformity with the decision of Justice Woods, late of the United States Supreme Court, denying to the children of colored parents in Louisiana, under the laws of that state, the right to attend the same public schools as those in which white children are educated. In this case, Justice Woods said: "equality of rights does not necessarily mean identity of rights."

The people of the United States, by their representatives in Congress support the public schools of the country's capital city, and where white and colored children are educated in separate schools. Congress votes public monies to separate charities; men, white and black, pitch their tents at the base of Washington's Monument to compete in acts of war in separate organizations. Trades unions, assemblies and industrial associations, maintain and march in separate organizations of white and colored persons.

Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and the defendant at the hearing. We cannot, therefore, say there is any undue prejudice or unjust preference in recognizing and acting upon that general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both.

Consistently thereafter, the Commission has approved segregation by carriers.[36] It is significant that, in placing this

[36] *Heard* v. *Ga. Rd. Co.*, 1 I.C.C. 428; *Edwards* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 12 I.C.C. 247; *Cozart* v. *Southern Ry Co.*, 16 I.C.C. 226; *Gaines* v. *Seaboard Airline Ry.*, 16 I.C.C. 471; *Crosby* v. *St. Louis—S. F. Ry. Co.*, 112 I.C.C. 239; *Mitchell* v. *Chicago, R. I. & P. Ry. Co.*, 229 I.C.C. 703; *Stamps* v. *Chicago, R. I. & P. Ry. Co.*, 253 I.C.C. 557; *Brown et al.* v. *A. C. L. Ry. Co.*, 256 I.C.C. 681; *Henderson* v. *Southern Ry.* 258 I.C.C. 413, 269 I.C.C. 73; *LeFlore et al.* v. *Gulf, Mobile & Ohio Ry Co.*, 262 I.C.C. 403; *Barnett* v. *Texas & Pac. Ry. Co.*, 263 I.C.C. 171; *Mays* v. *Southern Ry. Co.*, 268 I.C.C. 352; *Byrd* v. *Seaboard Airline Ry Co.*, 269 I.C.C. 344; *Jackson* v. *Seaboard Airline Ry. Co.*, 269 I.C.C. 399; *Stamps et al.* v. *Louisville & N. R. Co.*, 269 I.C.C. 789.

interpretation upon the Act, the Commission also adopted the view, of some latitude, that "the broad question of the right to segregate white and colored passengers has been upheld by the Supreme Court of the United States. *Hall* v. *DeCuir, L.N.O. & T. Ry. Co.* v. *Mississippi*, 95 U.S. 587; *Plessy* v. *Ferguson*, 163 U.S. 137; *C. & O. Ry.* v. *Kentucky*, 179 U.S. 388." *Edwards* v. *Nashville, Chattanooga and St. Louis Ry. Co.*, 12 I.C.C. 247.

When it was urged before the Commission, in *Brown* v. *Atlantic Coast Line R. Co.*, 256 I.C.C. 681, that segregation *per se* should be declared to be an unlawful discrimination even where equal accommodations can be furnished, the Commission asserted that this contention was evident that "the entire basis of this complaint is the fact that complainants were not permitted to mingle with the white passengers at meals" and that "What complainant asks us to decide is in its essence a social question, and not a question of inequality of treatment such as is prohibited by section 3 of the Act" (p. 695). Extensive portions of the opinion in *Plessy* v. *Ferguson* were then quoted, discussing social equality and declaring that the law is powerless to deal with racial animosity.

In dealing with the question of segregation, the Commission is not faced with a social question. In its essence the issue concerns basic liberties and privileges of individual passengers, not passengers according to their racial identity or number. It involves the right of each passenger to a carrier's facilities on a basis of equality the same as any other passenger, without the arbitrary distinction of race or color.

The Commission relies on *Chiles* v. *Chesapeake & Ohio Ry.*, 218 U.S. 71, and cases cited therein, as authority for its statement that the regulation of a carrier requiring separation of passengers by race is not "unlawful" (R. 190). Apparently this is in answer to appellant's contention that the regulation is unreasonable and a violation of section 1(4) of the Act. In the *Chiles* case the Court stated

that *Plessy* v. *Ferguson* "justified as reasonable the distinction between the races on account of which the statute was passed and enforced" and that the test of reasonableness of a state statute requiring segregation of intrastate passengers must also be the test of the reasonableness of a carrier regulation." Without regard to other infirmities implicit in the rationale of this case, it should be noted it was not decided under the Interstate Commerce Act and we submit that what is reasonable in the exercise of state police power is not necessarily the test of permissible conduct because of the Interstate Commerce Act's language and interpretations given it by this Court. Notwithstanding a violation of section 1(4) has been urged, the Commission has confined its decisions on segregation to section 3(1) of the Act. This question should have been decided by the Commission appropriately under section 1(4) which provides a direct remedy for the correction of a carrier's unreasonable rules, regulations, and practices. *Central Railway Co. of New Jersey* v. *U. S.*, 257 U. S. 247, 257.

That the act does not specifically require nor prohibit racial segregation is no justification for the Commission's refusal to prohibit it. There are obviously numerous practices not required nor prohibited by the act. Yet it is well established that the Commission has power to require or forbid them. In *United States* v. *Pa. Ry. Co.*, 323 U. S. 612, this Court, speaking through Mr. Justice Black, stated (p. 616):

> There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have neces-

sarily caused Congress to case its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the congressional purpose to foster an efficient and fair transportation system.

On prior occasions the Court frequently observed the sweeping provisions of the Act. *Warehouse Co. v. U. S.*, 283 U. S. 501, 512-513; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 749-750; *The Shreveport Case*, 234 U. S. 342, 356. In the latter case, the Court stated (p. 356): "there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach". In answer to the contention that if it be assumed Congress has the power, it had not been exercised, and hence the Commission's action exceeded the limits of the authority conferred upon it, the Court replied: "Such a matter is one with which Congress alone is authorized to deal and in view of the aim of the act and the comprehensive terms of the provisions against discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation." (p. 358) Certainly there is no question that Congress by virtue of its plenary power under Article I of the Constitution, possesses the authority to prohibit segregation. If, then, the absence in the act of specific prohibition is unnecessary to confer authority upon the Commission to correct a discriminatory practice, when that practice is brought to its attention in a proper proceding, it is its duty, and it is given the power under Section 15 of the Act, to enjoin any interstate carrier's regulation or practice which contravenes the act. We conclude, therefore, that the Commission's refusal to do so is beyond the latitude accorded its discretion, and is a denal of due process of law.

That the practice of racial segregation is carrier-initiated is not controlling. It is as a result of the Commission's

ruling that the carrier may continue the practice which the Commission has sustained. Racial discriminations which are the "wrongful acts of individuals" lie beyond the reach of the Constitution only so long as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Civil Rights Cases*, 109 U.S. 3, 17. The question in issue here is not simply an "individual invasion of individual rights". *Ibid.*, p. 11. The appellant has asserted a right under the Constitution and Interstate Commerce Act in a matter over which the Interstate Commerce Commission has properly exercised its jurisdiction; the substance and effect of its ruling is that the Commission acting as an agent of the federal government has sanctioned and condoned the practice of racial segregation of passengers. The Court below thus put it (R. 74, 74):

> The complainant is directly asserting in this proceeding that to allow the Commission's order here under review to stand would be tantamount to approving a rule or practice on the part of the Southern Railway that is violative of complainant's constitutional rights and not within the statutory power of the ICC to approve . . .
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> * * * * *
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> This contention [that if the carrier lawfully may segregate, the regulation nevertheless permits inequality of treatment] brings us at once face to face with the necessity of passing upon the validity of the dining car regulations of the Southern Railway, in effect at the time in question, because although these regulations have not been promulgated by the Interstate Commerce Commission, they have been directly approved by it, as a result of its decision and order which is the basis for the present complaint. Therefore, they are to be treated, for the purposes of this complaint, as in effect the Commission's rules. This is obviously true for the further reason that the present complainant is contending that the Commission erred in not requiring the Southern Railway to cease and desist from applying these rules; or more specifically, that the Southern Railway should be required hence-

forth to abstain from adopting any rule or regulation with respect to its dining car service that imposes, —as it is claimed the present rules do—upon Negro passengers, restrictions not imposed upon white passengers, under like conditions.

The Commission's order "dismissing a complaint on its merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status". *Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 124, 142. The ruling of the Commission that no violation of the Interstate Commerce Act is shown in the carrier's practice of racial segregation is administrative action which, regardless of form, "bears the clear and unmistakable imprimatur of the federal government. *Shelley* v. *Kraemer*, 334 U. S. 1. Regardless of the form in which the ruling was made—that no violation was shown and no affirmative action was ordered—it is the substance, and not the shadow, which determines the validity of its action. *I.C.C.* v. *Union Pacific R. Co. et al.*, 222 U. S. 541, 5; *Southern Pacific Co.* v. *I.C.C.*, 219 U. S. 433. When the effect of its order is to deny protection to any passenger its action exceeds the bounds of finality and immunity. *Powell* v. *U. S.*, 300 U. S. 276, 285; *Shelley* v. *Kraemer, supra.* A ruling by the Commission that a regulation is not shown to be unreasonable has certainly the same effect as a positive finding of negative fact, such as a ruling that a carrier's rates are not unreasonable, for it is as definite and binding in its effect and results. Cf. *Arizona Wholesale Grocery Co.* v. *Southern Pacific Ry.*, 68 F. (2d) 601. Its findings, positive or negative in form, constitute "a final and indisputable basis of action" as between the Commission and the appellant. Its orders have been said to "constitute a kind of administrative declaratory judgment of the rights of the parties". *Washington Terminal Company* v. *Boswell*, 124 F. (2d) 235.

This Court stated, with reference to the effect of the dismissal of a complaint by the Commission, in *El Dorado Oil Works Co.* v. *U. S. et al*, 328 U. S. 12, at p. 18:

> As the facts already stated reveal, the Commission's finding and determination if upheld constitute far more than an "abstract declaration". "Legal consequences" would follow which would finally fix a "right or obligation" on appellant's part. These findings are more than a mere "stage in an incomplete process of administrative adjudication", for the Commission here has discontinued further proceedings.

Legal consequences have followed from the ruling in this case which illustrate that Negro passengers must continue to be accommodated only at the "Jim Crow" table and, if that table is occupied, they will not be served elsewhere in the dining car although it is practically vacant, and no redress lies before the Commission or through a civil action for damages. In the *Civil Rights Cases*, 109 U. S. 3, at p. 18, this Court stated:

> The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, or his reputation; but *if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.* (Emphasis added.)

The Civil Rights Act of 1866 passed to enforce the provisions of the 14th Amendment was held, in the above cases, to be an unconstitutional legislative act of Congress because the 14th Amendment was not directed at individual action, not sanctioned in some way by the state. Congress, however, has plenary control over interstate commerce and, by the Interstate Commerce Act, has invested the Interstate Commerce Commission with primary jurisdiction to determine the lawfulness of an interstate carrier's regulations and practices. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. The Commission has exercised that jurisdiction in this case and, in effect, has sanctioned the practice of racial segregation enforced under an interstate carrier's regulation. The effect of its decision is to "furnish a precedent in all similar cases"

and its judgment is "conclusive upon the parties until reversed by this Court". *I.C.C.* v. *Brimson*, 154 U. S. 447. Because of the effect of the decision of the Commission and the court below in this case resort to a civil action for damages has been found futile. Even if it be said that the Commission has not "sanctioned in some way" the act of the carrier, that the lawfulness of the regulation has been in issue before the Commission, as a result of which it made its decision and ruling in this case, affirmed by the court below, has been held decisive, unfavorably, on the merits of a civil suit brought for redress against the carrier by a Negro passenger who was refused service at a vacant seat in the diner because the "reserved" table was occupied.[36a]

Unlike an individual who has suffered an individual invasion of a private wrong, an interstate Negro passenger's rights for refusal of accommodations are without vindication by resort to a civil action for redress, whether the wrongful act is denial of accommodations because the "reserved" table is occupied or because the carrier, though providing service, distinguished in the accommodations provided, solely on account of the passenger's race or color.

In *Truax* v. *Corrigan*, 251 U.S. 312, a statute forbidding the issuance of an injunction in a labor dispute, as construed by the state's highest court to grant an immunity to a wrongful individual invasion of another individual's rights, was held by this Court to deprive the person injured of due process of law. The Court stated (pp. 329-330):

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of

[36a] *Alleyne* v. *Southern Ry. Co.*, No. 10123, on appeal to U. S. Court of Appeals for the District of Columbia Circuit.

> property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.
>
> . . . To give operation to a statute whereby serious losses are inflicted by such unlawful means are in effect made remediless is we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law.

There the private individuals committed the unlawful acts. They were not acting as agents of the state or under compulsion of the state, nor had they sought the aid of the state to make their action effective, as in the covenant cases. But the law enacted by the state legislature, and as interpreted by the state court, by forbidding the issuance of an injunction against the ex-employees, deprived the employer of his property without due process of law because it made the employees' conduct lawful. It sanctioned an individual's act that harmed another's property and left him without any redress for the loss sustained. In like manner, by failing to forbid the carrier to cease and desist the enforcement of its regulation, the Commission, in permitting the carrier to continue, has sanctioned the carrier's practice of segregating passengers solely according to race or color. If sanction by a state of an individual's unlawful invasion of another's right violates the due process clause of the 14th Amendment, the action of the Commission and the court below are likewise a denial of due process of law, for the scope of the prohibition in the 5th Amendment is measured by the settled scope of the 14th Amendment. *French* v. *Barber Asphalt Paving Co.* 181 U.S. 324. The meaning of the same words in the two amendments is without any distinction that appears in judicial decisions. *Twining* v. *New Jersey*, 211 U.S. 78.

The Commission and the court below are charged with the protection of rights of national citizens, the same as the duty of a state to protect rights arising from state citizenship. *Corfield* v. *Coryell*, 4 Wash. Circuit Ct. Reports 380;

Civil Rights Cases, supra. A state, in discharging that duty, may deprive its citizens of substantive as well as procedural due process, by failure to act. Failure of a state to appoint counsel for a person charged with a serious crime, when necessary to his adequate defense, is a denial of due process of law. *Powell* v. *Alabama*, 316 U.S. 45. Like the state, in *Truax* v. *Corrigan, supra,* the Commission, as the agent of the legislative arm of the federal government, has sanctioned the carrier's conduct. Like the state, it is its responsibility to protect the rights of each individual passenger. Like a state, the Commission should not permit a public carrier to impose upon its passengers any regulation "so as to restrict their fundamental liberties." *Marsh* v. *Alabama*, 326 U.S. 501. It is not only within its power, but it is the duty of the Commission to nullify practices invading personal rights of passengers as well as those resulting in rebates or preferences, "whatever form they take and in whatsoever guise they may appear." *U. S.* v. *La. & P. R. Co.* 234 U.S. 1. In speaking of the affirmative responsibility of the Commission to correct carrier practices invading personal rights of individual passengers, and the exclusion by the carrier of a Negro passenger from a Pullman car as a "palpably unjust" denial of equality of treatment, this Court, in *Mitchell* v. *U. S.*, 313 U.S. 80, at p. 97 stated: "We find no sound reason for the failure [i. e., of the Commission] to apply this principle by holding the discrimination from which the appellant suffered to be unlawful and by forbidding it in the future."

Granting the determination of whether a practice is reasonable or unjust as "one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission",[37] the question here is whether an interstate carrier may lawfully differentiate in the accommodations provided passengers, solely on the basis of a passenger's race or color. This is a matter of law re-

[37] *Manufacturer's Ry. Co.* v. *U. S.* 246 U. S. 457, 481.

viewable by this Court [38] and calls for no expert knowledge or exercise of administrative expertise.

The Commission has simply enforced a substantive rule of statutory interpretation which makes race or color the sole controlling factor in its application. It is as a result of the Commission's decision and order that the carrier may continue to segregate passengers by race. As in *Bridges* v. *California*, 314 U.S. 253, 261, its decision and that of the court below "do not come to us encased in the armor wrought by prior legislative deliberation." Whatever deliberation may lie behind the Commission's terse formulation of policy is not apparent. Its reliance on *Chiles* v. *Chesapeake & Ohio Ry. Co.* is an evasion of its responsibility to determine whether a carrier's regulation enforcing racial segregation is unreasonable under the act. The rancor Negroes must bear when they are discriminated against by owners of public facilities such as restaurants, theaters, hotels, etc. open to all members of the public, except Negroes, becomes intolerable when the federal government lends a hand to discrimination by a public carrier by simply replying to a Negro passenger that no wrong is "shown" in the carrier's enforcement of racial segregation and in failing to assert its power to order it ended. Does the Act have to prohibit segregation in order for the Commission to be shown it is unlawful? Is there any reason why other practices do not have to be spelled out specifically in the act for the Commission to see, upon its own initiative, or be shown, upon complaint made to it, a violation of the act? The conclusion is inescapable that the Commission cannot or refuses to see a violation, properly presented to it for its primary determination.

The Commission's long-continued practice of permitting racial segregation by carrier regulation or practice indicates an intention to adhere in the future to this cryptic formulation of policy. *Cf. Eastern-Central Motor Carrier's Assn.* v. *U. S.*, 321 U.S. 194. The consistency of this

[38] *Central R. Co. of New Jersey et al* v. *U. S. et al*, 257 U. S. 247, 257.

administrative practice, though often challenged, is not reason sufficient to justify its continuance. Acquiescence in the past by the Commission in the transportation of private passenger cars by carriers free of charge or at other than published tariff rates was no justification for its continuance nor a barrier to holding the practice an unjust discrimination in violation of section 3(1) of the Act. *Louisville & N. R. Co.* v. *U. S.* 282 U.S. 740. Notwithstanding the absence in the act of a specific prohibition against the practice, the court therein stated, at p. 759:

> Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice.

There are cogent reasons why this administrative practice should be overturned. The manner in which the Commission's powers are utilized in regulating interstate commerce is a matter of public concern. The entire public has an interest in the measure of protection afforded each passenger and an interest in the removal of discriminations and distinctions based on race by agencies of the federal government in matters under their control. Like courts of equity, which "may go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved" the Commission, performing a public act of the federal government in giving and withholding relief requested, should make full use of the powers it possesses to put an end to practices of interstate carriers which make race the sole factor in their application. How the carrier treated appellant and what he and all other Negro passengers may expect in the future is not simply a private, insignificant matter between a Negro passenger and the

Southern Railway Company. "More is involved than the settlement of a private controversy without appreciable consequences to the public."[39] Public carriers which restrict the use of their facilities by Negro passengers to one dining car table behind a partition, in enforced privacy, "are not acting in matters of purely private concern like the directors or agents of business corporations. They are acting in matters of high public interest."[40] The practice of carrier initiated racial segregation is not confined to the Southern Railway, the largest railroad operating in the South, but is enforced by many, if not all, carriers operating in states which have enacted statutes requiring racial segregation of passengers by public carriers, notwithstanding those statutes do not apply to interstate commerce.[41] The growth and extent of this practice beyond state boundaries affecting innumerable passengers, makes it paramountly a matter of public concern. This Court, in *Block* v. *Hirsh*, 256 U.S. 135, stated, at p. 155:

> Plainly circumstances may so change in time, so differ in space as to clothe with such an interest [i. e., a public interest] what at other times or in other places would be a matter of purely private concern . . . They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair.

The public interest in the removal of racial segregation by interstate carrier regulation is certainly at least as great as its interest in the provision of a connection with another road, the purpose of both being to promote public convenience. This court has held that requiring a railroad to furnish this facility, even if it must be done at a loss, is clearly "within the scope of the power to enforce just and

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[39] *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552.

[40] *Nixon* v. *Condon*, 286 U. S. 73, 88.

[41] Regulations of other carriers enforcing racial segregation were before the Commission in *Stamps* v. *L. & N. R. Co.*, 269 I.C.C. 789; *Brown* v. *Atlantic Coast Line Ry. Co.*, 256 I.C.C. 681; and *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I.C.C. 399.

reasonable regulations" when "considered from the point of view of the requirements of the public interest." *Atlantic Coast Line Ry. Co. v. N. C. Corporation Commission*, 206 U. S. 1.

The sanction given the carrier regulation based solely on race, by the Commission, and its failure to order it terminated is a matter of interest not only to Negro members of the public who bear the brunt of racial segregation. All other members of the public likewise have an interest in its removal, because of the nature of this odious and irrelevant practice, and for the further reason that if this type of arbitrary practice is permitted and sanctioned by the Commission, there is no reason why any other practice as unreasonable and unjust may not be allowed, which will affect them on the same haphazard basis.

(1) *Racial Segregation is Unconstitutional*

The Commission and the Court below were of the opinion that segregation based on race abridges no rights protected by the Constitution or the Interstate Commerce Act. The Commission relied on *Chiles* v. *C. & O. Ry. Co.*, 218 U.S. 71 as authority for the lawfulness of an interstate carrier regulation requiring segregation of passengers by race. The Court below declared that this Court has repeatedly held that "race segregation by State law is not *per se* an abridgment of any constitutional right secured to the citizen. See *Plessy* v. *Ferguson*, 163 U.S. 537; *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337." (R. 72) It further stated: "Without minimizing the criticism directed at this feature of the service [humiliation and embarassment caused Negro passengers], we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine" (R. 79, 256). It concluded: "Racial segregation of interstate passengers is

not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act, or any other Act of Congress so long as there is no real inequality of treatment of those of different races" (R. 260).

An examination of the cases cited in support of the constitutionality or lawfulness of segregation does not support this conclusion, for the cases neither decide the issue herein raised nor are they controlling authority in view of subsequent developments in the law.

The constitutional right of passengers not to be segregated according to race, under state law, was not raised in *Hall* v. *DeCuir*, 95 U. S. 485. The case involved a state criminal prosecution of an interstate carrier for failure to comply with a state law forbidding segregation of passengers by race. The sole question decided was that a state could not forbid racial segregation of passengers because of the burden on interstate commerce caused by the confusion arising from varying provisions of state laws on a subject requiring national regulation. The principle of that case was affirmed in *Morgan* v. *Virginia*, 328 U. S. 373, in which a statute requiring racial segregation of interstate passengers on interstate motor carriers was declared unconstitutional because of the similar burden imposed on interstate commerce. In the latter case the Court recognized the burden imposed on passengers when "required to order their movements on the vehicle in accordance with local rather than national requirements." 328 U. S. at 380-381.

Hall v. *DeCuir* was decided under the commerce clause of the Constitution, in 1877, ten years prior to the enactment of the Interstate Commerce Act. The statement made therein, and relied on in the Chiles Case, that "inaction of Congress was equivalent to a declaration that a carrier could, by regulation, separate colored and white passengers", is today inapplicable, for in the enactment of the Interstate Commerce Act, Congress has restricted the latitude of permissible carrier action and the absence

in the Act of a specific command does not in itself indicate an intention on the part of Congress not to require an act or to forbid a practice. The *Shreveport Case*, 234 U. S. 342; *U. S.* v. *Pennsylvania Ry. Co.*, 323 U. S. 612. Its provisions are broad enough in scope to embrace any prohibition within the power of Congress to declare and its silence is not *per se* equivalent to a declaration that in interstate carrier may enforce racial segregation.

In the most recent case relied on, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, the Court ruled that where a state provides educational facilities, it must furnish them to all its residents and that the provision of equal, though separate, facilities is a method the validity of which has been sustained by this Court's decisions, citing *Plessy* v. *Ferguson, supra; McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co., supra;* and *Gong Lum* v. *Rice*, 275 U. S. 78, in support thereof, and referring to *Cummings* v. *Board of Education*, 175 U. S. 528.[42] In *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, the Court stated that, in view of the decision in *Plessy* v. *Ferguson*, it had no reason to doubt the conclusion of the court below that the validity of a state statute requiring separate but equal accommodations for the two races was no longer open to question. In *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, the Court stated:

(1) "We have seen that it was decided in *Hall* v. *Decuir* that the inaction of Congress was equivalent to the

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[42] In *Gong Lum* v. *Rice*, *supra*, the Court held that equal protection of the laws was not denied a Chinese child by classifying her as "colored" and in compelling her to attend a school maintained for colored races. The Court quoted from *Plessy* v. *Ferguson*, noting its reference to *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198 (decided prior to the 14th Amendment), as authority for the constitutionality of state classification by race or color and concluded that, "assuming the cases above cited to be rightly decided" (uphold: g the constitutionality of separate schools for white and black pupils), a distinction between white and yellow pupils was permissible. There the constitutionality of segregation was not decided but assumed to be valid by authority of *Plessy* v. *Ferguson*. In *Cummings* v. *Board of Education*, 175 U. S. 528, the Court, speaking through Mr. J. Harlan, held that an injunction to restrain the collection of local taxes because separate high school facilities had been abandoned was not proper; but that a different question would have arisen if the plaintiffs had sought directly in an appropriate proceeding to compel the board of education to establish and maintain a separate school for Negro children.

declaration that a carrier could, by regulations, separate colored and white interstate passengers.

(2) "*Plessy* v. *Ferguson* justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs, and traditions of the people,' and the 'preservation of the public comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulation which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. See also *Chesapeake & O. Ry. Co.* v. *Kentucky*, 179 U. S. 388.

"The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy* v. *Ferguson* at page 550."

Chesapeake & Ohio Ry. Co. v. *Kentucky*, 179 U. S. 388, cited in the opinion above, decided that a state statute requiring separate railroad coaches for white and colored passengers was not invalid as an interference with interstate commerce because, as construed by the highest court of Kentucky, it applied only to intrastate passengers. So construed, the court stated there was no doubt as to its constitutionality, citing *Plessy* v. *Ferguson*.

Reference to the cases relied on shows *Plessy* v. *Ferguson* as the source and main support for the establishment and maintenance of racial segregation as an institution in American democratic society and the uncritical dependence on this case as having foreclosed once and forever the validity of state action based on distinctions between citi-

zens solely because of their race. Segregation is constitutional, the courts consistently rule, irrespective of the applicable rulings of this court which make its authority questionable and irrespective of the particular right asserted and not decided in that case.[43]

Plessy v. *Ferguson*, 163 U. S. 537, held that a state law requiring segregation of intrastate passengers by race was not an abridgment of a colored citizen's privileges or immunities, nor a deprival of property (the reputation of belonging to the dominant race) without due process of law, nor a denial of equal protection of the laws. The Court's conclusion proceeded from three basic premises: (1) the 14th Amendment was not intended to abolish racial segregation; (2) segregation "does not necessarily imply the inferiority of either race to the other" and if it does "it is solely because the colored race chooses to put that construction upon it"; and (3) racial distinctions afford a reasonable basis for the exercise of state police power.

The legislative history of the 14th Amendment, including the debates preceding the adoption of the Civil Rights Act of 1866 whose analogous provisions were considered to be incorporated in the 14th Amendment,[44] affords substantial justification for the view that the 14th Amendment was intended to abolish racial segregation and it was so understood by the majority of its supporters, its opponents, the state legislatures ratifying it, and the public.[44a]

Whether segregation necessarily implies inferiority may have been a matter of conjecture in 1896, when *Plessy* v. *Ferguson* was decided. The Court believed not, but subsequent experience with segregation in actual practice over a period of years has unequivocally proved the fallacy of

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[43] One variance is noted in *Mendez* v. *Westminster School Dist.*, 64 F. Supp. 544, aff. 161 F. 2d 774, noted in 56 Yale Law Journal 1059, in which the lower court held that the provisions of separate schools for children of Mexican ancestry admittedly equal to other schools did not afford equal protection of the laws under the 14th Amendment.

[44] Flack, *The Adoption of the 14th Amendment*, pp. 54, 81.

[44a] Ibid., pp. 41, 45, 54, 173-5, 250-277; 2 Congressional Record 4174-4 (1874).

this assumption and overwhelmingly demonstrated in the most graphic manner that segregation not only implies inferiority—it does mark Negroes as inferior and unfit to associate with or share public facilities on a common basis of indiscriminate equality with persons of other races. And it is, as a matter of provable fact, not because of the construction put upon it by the "colored race" but because of the infirmities imposed upon members of a minority group, who are certainly kept separate, but who have never shared equality, not even that mythical "substantial" equality. Mr. Justice Harlan in his dissenting opinion in *Plessy* v. *Ferguson*, pointedly stated (163 U. S. at 562):

> We boast of the freedom enjoyed by our people above all other peoples. But is is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of citizens, our equals before the law. The thin guise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

The Report of the President's Committee on Civil Rights, entitled "To Secure These Rights", issued on October 29, 1947, puts the matter squarely, pp. 81-82:

> If evidence beyond that of dispassionate reason was needed to justify Justice Harlan's statement [quoted above], history has provided it. Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates the educational, recreational, and other public facilities for the two races which are "separate but equal". In the Committee's opinion this is one of the outstanding myths of American history, for it is almost always true that while indeed separate, those facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax supported services and facilities.

That segregation more than implies and implements an inferior status has been established by extensive, well-documented, competent research, which is relevant and whose consideration is necessary to an informed judgment.[45] An examination and appraisal of the *facts* will clearly demonstrate that segregation does in fact imply inferiority and is unconstitutional by the very test implicit in the opinion in *Plessy* v. *Ferguson*, for it appears that if the Court was of the opinion that the statute requiring segregation did imply inferiority, it would have invalidated it.[45a]

Plessy v. Ferguson, further, as the Court paraphrased its opinion in *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, "justified as reasonable the distinction between the races on account of which the statute was passed and enforced", that purpose being for "the promotion of their comfort and the preservation of the public peace and good order". While the preservation of peace and good order is a permissible objective in the exercise of police power, if that is the real purpose of segregation, decisions of this Court amply show that classification by race alone has no reasonable relation to this end nor is it a means reasonably adapted to achieve it. To the argument that residential segregation would prevent race conflicts and promote the public peace, this Court, in *Buchanan* v. *Warley*, 245 U. S. 60, 80-81, replied: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution". In a later case, *Harmon* v. *Tyler*, 273 U. S. 668, in which the lower court had ruled

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[45] See, for example, Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy", pp. 27-30, 757-764; Buel G. Gallagher, "Color and Conscience—The Irrepressible Conflict"; Johnson, "Patterns of Negro Segregation", pp. 244-324; Heinrich, "The Psychology of a Suppressed People", pp. 52, 57-61; Dollard, "Caste and Class in a Southern Town", p. 253; Sutherland, "Color, Class and Personality", pp. 42-59; Moton, "What the Negro Thinks", pp. 12-13.

[45a] This conclusion is also suggested in "Is Racial Segregation Consistent With Equal Protection of the Laws: Plessy v. Ferguson Reexamined", 49 Col. L. Rev. 629 (1949); and "Segregation in Public Schools—A Violation of Equal Protection of the Laws' "; 56 Yale L. J. 1059 (1947).

that an ordinance similar to the one involved in *Buchanan* v. *Warley, supra,* was a legitimate exercise of the police power to discourage social intercourse between the races and was not discriminatory because the restraint applied equally to both races, the judgment enjoining the leasing of a home in a white community to a Negro was reversed *per curiam* on the authority of the *Buchanan* case.

In determining the reasonableness of an interstate carrier's regulation, the court, in *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, also followed the test used in *Plessy* v. *Ferguson*—"the established usages, customs, and traditions of the people", as well as the promotion of public comfort, peace and good order. Where members of a minority are asserting that a law infringes their rights, it is particularly inappropriate to look to established usages, customs, and traditions to determine whether a law deprives them of rights. Obviously, under this test, any law the majority enacts would be reasonable though that very law may nevertheless deprive minorities of their rights, because the denial has been one of custom, usage, and tradition, wilfully or unintentionally, and the minority, because it is a minority, has lacked recognition and protection of its rights. This seems to have been recognized by this Court in its attitude when the reasonableness of legislation has been challenged. The usual presumption supporting the validity of legislation does not prevail where prejudice against "discrete and insular minorities" may tend "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products Co.*, 304 U. S. 144, f.n. 4.

The history of the struggle of the Negro minority to exercise the right to vote is a striking example of the error in recourse to customs and traditions to determine the validity of legislative or other State action. Even after the specific right was granted by the 15th Amendment to the Constitution, and this Court declared the right of

Negroes to vote, the custom of denying the exercise of the right continued and one lawsuit after another has been required to overcome devices used to deny this right, in accordance with the established custom, usage, and tradition of the majority.[46]

The test of reasonableness utilized in *Plessy* v. *Ferguson* is not the test customarily employed to determine the "reasonableness" of legislation. Prior thereto, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, the standard was found in essential justice. The rule usually applied by this Court in determining whether federal or state governmental action is due process of law is whether it bears a reasonable relation to a permissible end. *Nebbia* v. *New York*, 291 U. S. 502; *Heiner* v. *Donnan*, 285 U. S. 312. It is clear that distinctions because of race or ancestry are odious in our democratic society and except in the most unusual circumstances bear no relation to a permissible governmental end. During the past war, the race or national origin of Japanese citizens, otherwise irrelevant, was a fact of which the federal government could take cognizance and make the basis of classification because it was of important relevance to a governmental end, the prosecution of war with Japan. In *Hirabayashi* v. *U. S.*, 320 U. S. 81, this Court stated:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. [Citations omitted.] We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with perils

[46] *Nixon* v. *Herndon*, 273 U. S. 536; *Guinn* v. *U. S.*, 283 U. S. 347; *Meyers* v. *Anderson*, 283 U. S. 368; *Lane* v. *Wilson*, 307 U. S. 268; *Nixon* v. *Condon*, 286 U. S. 73; *U. S.* v. *Classic*, 313 U. S. 299; *Smith* v. *Allwright*, 321 U. S. 649; *Rice* v. *Elmore*, 165 F. 2nd 387; cert. denied, 333 U. S. 875; *Brown* v. *Baskins*, 78 F. Supp. 933.

> of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.

Thus, "pressing public necessity", as in time of war, may justify the complete segregation of a single racial group, though in time of peace such action would be "lawless". *Korematsu* v. *U. S.*, 323 U. S. 214, 216, 224.

To determine whether equal protection has been afforded, the distinction or classification made must have a rational basis in a genuine difference between the groups affected, reasonably related to the subject matter. Differences of race or color or national origin are an irrelevant and arbitrary classification. Where, as a result of such classification, persons are discriminated against, by intention or result, solely because of race or color, the action has been declared unconstitutional. This rule has been followed where Negroes have been the particular persons discriminated against.[46a] Race clearly cannot be made the basis of classification affecting the right to vote. *Nixon* v. *Herndon*, 273 U. S. 536. Negroes are, of course, not the only minority discriminated against. State action has been invalidated also when the discrimination is directed at citizens or aliens of other national origin, members of another "colored race".[47] A state may not make race or color a basis of classification simply because Congress may and has done so, in the exercise of power conferred upon it by the Constitution. *Takahashi* v. *Fish and Game Commission*, 332 U. S. 410. The power of the state, like the power of an interstate carrier, is more narrowly limited than that of Congress. And the fact that the state's action, whatever its nature, may apply indiscriminately to all racial

[46a] *Hill* v. *Texas*, 316 U. S. 400; *Strauder* v. *W. Va.*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Ex Parte Virginia*, 100 U. S. 339, involving exclusion of Negroes from service on petit and grand juries.

[47] *Oyama* v. *California*, 332 U. S. 633; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

classes defined makes it nonetheless a denial of equal protection of the laws. *Buchanan* v. *Warley*, 245 U. S. 60; *Shelley* v. *Kraemer*, 334 U. S. 1.

Whether the Court in *Plessy* v. *Ferguson* considered racial segregation permissible and reasonable under the due process or the equal protection clause of the 14th Amendment, the error of its ruling is plain when considered in the light of subsequent decisions from which it marks a serious departure and with which it cannot be reconciled.

Plessy v. *Ferguson* has been wholly relied on, as in the *Chiles* case, as authority for the broad statement that the Supreme Court has upheld the constitutionality of segregation or, as the court below stated, "the principle of segregation has been approved by the Supreme Court" (R. 256), and that the question of the constitutionality of racial segregation is closed.

The results of its ruling have borne out Justice Harlan's prediction, in his dissenting opinion, that "the judgment this day rendered will in time, prove to be quite as pernicious as the decision in the *Dred Scott* case." *Plessy* v. *Ferguson* has received much attention and has been the subject of much criticism because of its untenable uninformed assumptions and its fallacious reasoning.[47a] Millions of Americans who, directly as a result of its formulation of the doctrine of "substantial equality" or "separate but equal", have experienced the enforcement only of separateness, and are still, and will continue to be, denied equality. The Report of the President's Committee on Civil Rights makes this indictment:

> The separate but equal doctrine stands convicted on three grounds. It contravenes the equalitarian spirit of the American heritage. It has failed to operate, for history shows that inequality of service has been

[47a] See note 45a, *supra*; Waite, "The Negro in the Supreme Court," 30 Minn. L. Rev. 319 (1946); Watt and Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 Ill. L. Rev. 13 (1949); McWilliams, "Race Discrimination and the Law," Science and Society, Vol. 9, No. 1 (1945).

> the omnipresent consequence of separation. It has institutionalized segregation and kept groups apart despite indisputable evidence that normal contacts among these groups tend to promote social harmony. [P. 87.]

The opposition of segregation to basic concepts of democracy and its effect on all those who enforce the segregation as well as those who are segregated,[48] should not be overlooked. The Report also stated (p. 141):

> It is impossible to decide who suffers the greatest moral damage from our civil rights transgressions, because all of us are hurt. That is certainly true of those who are victimized. Their belief in the basic truth of the American promise is undermined. But they do have the realization, galling as it sometimes is, of being morally in the right. The damage to those who are responsible for these violations of our moral standards may well be greater. They, too, have been reared to honor the command of "free and equal." And all of us must share in the shame at the growth of hypocrasies like the "automatic" marble champion. All of us must endure the cynicism about democratic values which our failures breed. *The United States can no longer countenance these burdens on its common conscience, these inroads on its moral fiber.*

It has been said "The mere formulation of a relevant constitutional principle is the beginning of the solution of a problem, not its answer".[49] Assuming the establishment of segregation as a conscientious attempt to deal with the problem of race hostility, and the formulation of the principle of "separate but equal" as an effort to provide constitutional protection within that restriction, experience

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[48] In a study made for the purpose of securing data which would be of assistance to courts in considering the validity of racial segregation, it was reported that in a poll taken of current opinion of psychologists, sociologists, and anthropologists, 90% of the total sampled were of the opinion that enforced racial separation has detrimental effects on the segregated groups and 83% that it also has detrimental effects on the group which enforces the segregation. Deutscher and Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion." (1947)

[49] Mr. Justice Frankfurter, dissenting in *People of State of Illinois* v. *Board of Education*, 333 U. S. 203, at p. 212.

has shown that "separate but equal" is only a theory, and is not the answer to the problem. Because of the conflict of *Plessy* v. *Ferguson* with present day law, its authority has been greatly impaired and it is no longer binding. To the extent that it is applicable to the validity of an interstate carrier's regulation, under the Interstate Commerce Act, *Plessy* v. *Ferguson* and *Chiles* v. *Chesapeake Ry. Co.*, 218 U. S. 71, which is based on *Plessy* v. *Ferguson*, are eminently and of necessity now subject to re-examination and should be overruled.

B. The action of the Commission and the Court is contrary to the national transportation policy of the United States.

The national transportation policy of the United States should be clarified by this Court, with respect to the race of interstate passengers. This requires reconsideration of *Chiles* v. *Chesapeake and Ohio Ry. Co.*, 218 U. S. 71, and *Plessy* v. *Ferguson*, 163 U. S. 537, which it follows, and the unequivocal declaration of a single uniform rule for seating arrangements for interstate passengers, under the commerce clause of the Constitution and the Interstate Commerce Act, stripped of technicalities and the irrelevances of race.

Thus far this Court has declared the law to be: (1) States may require racial segregation of intrastate passengers if equal facilities are provided. *Plessy* v. *Ferguson*, 163 U. S. 537. (2) States may not forbid or require racial segregation of interstate passengers, *Hall* v. *DeCuir*, 95 U. S. 485; *Morgan* v. *Virginia*, 328 U. S. 373. (3) An interstate carrier may, in the absence of action by Congress, by regulation, segregate passengers according to race. *Chiles* v. *Chesapeake and Ohio Ry. Co.*, 218 U. S. 71. (4) Refusal of accommodations solely because of a passenger's race is discriminatory and a denial of the fundamental right of equality of treatment specifically safeguarded by the Interstate Commerce Act. *Mitchell* v. *U. S.*, 313 U. S. 80.

Three questions arise: (1) In the field of interstate commerce, within the exclusive purview of the federal government, may an interstate carrier, in a matter where a single, uniform rule for seating arrangements is required, segregate passengers solely according to race or color? (2) Is indiscriminate equality of treatment afforded when passengers are segregated solely because of race or color? (3) Is racial segregation a burden on interstate passengers and carriers, unreasonable, and unnecessary?

We contend the answer to the first question is that under the sweeping provisions of the Interstate Commerce Act, designed primarily for the protection of passengers, a carrier may not segregate passengers solely because of race and that this Court should so declare unequivocally. The discriminatory carrier practice based solely on race is within the power of Congress to forbid and within the authority of the Commission to order the carrier to cease. In the enactment of the Interstate Commerce Act, as an expression of the national transportation policy, there is no warrant that Congress intended interstate passengers be segregated according to race, notwithstanding the absence in the Act of a specific prohibition.

The answer to the second question is that differentiation between passengers, according to their race and numbers, is not equality of treatment even though the restriction imposed by the carrier, on freedom of selection of accommodations and of passengers with whom one chooses to dine; apply with equal force to all passengers indiscriminately, but solely according to race. The right to equality of treatment, like the right to equal protection of the laws, is a right personal to each individual passenger. In view of their identity in nature and of our constitutional policy, equality of treatment, like equal protection of the laws, is denied when race is made the sole basis of the carrier's action restricting any passenger's right to eat where and with whom he chooses. Equality of treatment is thus denied the same as equal protection, by "indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S.

1, 22. Certainly Congress intended it to be a policy of national transportation that a carrier be held to at least the standard of equal treatment as that of a state under the equal protection clause and, in view of the language of the act and its interpretation by this Court, the measure of duty required of a state under the equal protection clause is at least the minimum measure of equality of treatment required of a carrier under the act. Certainly Congress did not intend to authorize indiscriminate inequality of treatment.

The answer to the third question, we submit, is that racial segregation enforced by voluntary carrier regulation is as much a burden on interstate passengers as is a state statute compelling a passenger to order his movements in accordance with local customs. Though no shifting of seats is required under the carrier's regulation, a Negro passenger has no choice of accommodations in sections set aside for *all other* passengers. Yet no state can deprive him or any other person of choice as to a place to live, solely because of race, by legislation or judicial enforcement of covenants expressing individuals' notions of where he or another may live. Negro passengers are the only passengers confined to the use of one table. This discrimination against persons of one race or color is just as discriminatory as that imposed on citizens of another race or color when, solely because of that race or color, he is deprived of property. *Oyama* v. *California*, 332 U. S. 633. Certainly rights of person are entitled to at least the same respect and protection as rights in property. The humiliation and indignity suffered by Negroes when they are ostracized from everyone else is a burden that can really be appreciated only by those who have ever been punished for crimes they have not committed. The carrier has imposed upon itself the burden of cost in removing the separating curtains and installing partitions in every dining car, though this burden will ultimately fall on all passengers. In the absence of a supporting definitive statute, it has assumed the burden of determining the race of pas-

sengers in assigning them space, and the cost resulting from its liability for error in the determination, though this also is ultimately borne by the passengers.[50]

Apart from the personal burden on Negro passengers, racial segregation of interstate passengers by carrier regulation is directly opposed to what this Court has declared the national transportation policy requires—a uniform rule in seating arrangements, without distinction as to the race of passengers. In *Morgan* v. *Virginia*, 328 U. S. 373, a Virginia statute requiring racial segregation of interstate passengers was declared unconstitutional under the commerce clause. Under this ruling it would follow that the Virginia statute, and the statutes of any other state in which the Southern Railway operates, requiring racial segregation of passengers on interstate rail carriers are invalid. That the ruling is not confined to interstate motor carriers is apparent in the Court's affirmance of the principle established in *Hall* v. *DeCuir*, 95 U. S. 485, which involved an interstate water carrier. The mode of conveyance is immaterial, for the principle is that a state may not forbid or require racial segregation of interstate passengers.[51] In so far, therefore, as the Virginia statute[52]

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[50] Damages have been recovered for this mistake. *May* v. *Shreveport Traction Co.*, 127 La. 420, 53 So. 671; *Flood* v. *News and Courier Co.*, 71 S. C. 112; *City Bus Co.* v. *Thomas*, 172 Miss. 424, 160 So. 582; *Louisville Ry. Co.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411, 41 L. R. A., N. S. 958, Ann. Cases.

[51] Chairman Aitchison, in his dissenting-in-part opinion said: "For the reasons stated in my dissenting-in-part expression in *Mays* v. *Southern Railway Co.*, 268 I. C. C. 322, decided April 8, 1947, wherein we considered the identical dining car regulations that we are now considering, I dissent from the finding that these regulations, now currently in force, are not shown to be in violation of section 3, or of any other provision of the act." (R. 11) In the Mays case, he stated: "However, I am constrained to regard it as now settled by *Morgan* v. *Virginia*, 328 U. S. 373, and *Matthews* v. *Southern Railway System*, 157 F. 2nd 609, that the race of a passenger may not constitute a valid basis for any differentiation or segregation in the course of interstate travel upon a carrier subject to the provisions of the Interstate Commerce Act, as that act now stands, and as interpreted by the courts." In *Matthews* v. *Southern Railway System*, *supra*, the court said that the passengers were correct in their contention that the Virginia statute requiring racial segregation on railways was invalid as to interstate passengers and stated: "That question has been settled by *Morgan* v. *Virginia*, 1946, 66 S. Ct. 1050. The decision in the case at bar was withheld by this court pending that decision, as probable jurisdiction was noted, 66 S. Ct. 491, in that case, shortly after this case was argued. We see no valid distinction between segregation in buses and in railroad cars."

[52] Va. Code Ann. 1942, Secs. 3962-3964.

requiring racial segregation applies to interstate rail passengers, it is unconstitutional under the commerce clause.

If seating arrangements of interstate carriers is a matter "where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose[53]—it logically follows that racial segregation by interstate rail carriers is likewise unnecessary and, like "state regulation of association on interstate vehicles", the carrier regulation "hampers freedom of choice in selecting accommodations".[54] The alleged usefulness of racial segregation is that it preserves the public peace, but this is far outweighed by its disadvantages: discrimination against particular persons—Negro passengers; discrimination against any diner denied available accommodations solely because of his race; waste of accommodations and loss of revenue to carriers, by refusing service to passengers because the space is reserved for those of another race or color; increased cost to the carrier, ultimately borne by all passengers, of installing partitions in all dining cars; the difficulty and burden imposed on the steward in determining pasengers' racial identity; the cost to the carrier for error in deciding a passenger's race and assigning him to a section reserved for passengers of another race; and the approved practice of classifying passengers on the irrelevant and arbitrary basis of race.

The Court in *Morgan* v. *Virginia, supra,* emphasized the necessity for a "single uniform rule, to promote and protect national travel". 328 U. S. at 386. It is common knowledge that no segregation by race of passengers is the rule in the majority of national travel, rail, water, and air. It appears then, that the rule of a minority of carriers, including the carrier herein involved, is in direct opposition to, and impedes this requirement.

The carrier can no longer be considered as a mere pricate individual or corporation making rules for the use of its property. That property has become sufficiently im-

[53] 328 U. S. at 377.
[54] Ibid at 383.

pressed with a public interest to be circumscribed by the same limitations applicable to states and if state imposed racial segregation is invalid irrespective of the particular constitutional provision invoked, because a uniform rule in seating arrangements without regard to race is necessary to promote and protect national travel, it is difficult to see how carrier imposed segregation squares with the requirement.

Assuming that Congress has the power, within the limitations of the Fifth Amendment, to require segregation of passengers according to race, it has not acted, even under its power to prescribe rules applicable to particular localities. In the absence of action by Congress, states undertook to regulate the subject, but this Court ruled that this could not be done. Since Congress has not acted, and the states are forbidden to regulate the subject, eminently one for national regulation, it hardly seems appropriate to allow a privately owned corporation, exercising a public function, to dictate seating arrangements of interstate passengers according to their race.

This Court has never ruled that racial segregation of passengers is permitted under the Interstate Commerce Act. In *Mitchell* v. *U. S.*, 313 U. S. 80, the Court stated that the question there involved was not one of segregation. The contention was strenuously urged that state statutes requiring racial segregation of passengers on railroads were not applicable to an interstate passenger. The appellant did not contend, nor did the Court decide, the question whether racial segregation, in and of itself, is a violation of the act. There a Negro passenger was absolutely refused Pullman accommodations although space was available, other than in the drawing room to which Negroes are customarily assigned, at reduced rates. In such a situation the Court declared that the carrier's total denial was discriminatory and a denial of equality of treatment, and that the passenger was entitled to be accommodated on the same basis as any other passenger. In view

of the total refusal of accommodations there was no occasion to decide, if facilities had been furnished, but on a segregated basis, whether racial segregation per se is a violation of the act. That the drawing room was occupied and that the carrier would have had to accommodate the passenger on a non-segregated basis was immaterial. The Court made it clear that he was entitled to available accommodations on that trip. If the drawing room was occupied, whether or not the carrier had any other means of segregating him, he was entitled to space on that trip and to be seated elsewhere in the car where there was space, partitions, doors, or curtains absent notwithstanding.

This Court has recognized the "need for national uniformity in the regulations for interstate travel". *Morgan* v. *Virginia*, 328 U. S. 373, 386. If it is clear that a single uniform rule as to seating arrangements is necessary to promote and protect national travel by interstate motor carriers, it is certainly clear that a single, uniform rule is necessary to promote and protect national travel by interstate rail carriers, at least that of Negro passengers whose numbers have increased. That need of national uniformity is not met when regulations, imposed by some carriers, are directly opposed to the rule. This Court has held that, under the commerce clause, the national interest in uniformity is paramount. To protect and promote the national interest in travel by Negro interstate passengers as to race, the regulation of a carrier, attempting to deal with race relations beyond the power of the states in which it operates, should be declared by this Court an unlawful regulation of interstate commerce in a matter where only Congress is authorized and competent to act.

C. The action of the Commission and Court is contrary to the public policy of the United States.

Historically courts have quarried public policy from domestic laws and legal precedents,[55] international compacts and from the declarations and judgments of its great jurists and statesmen. It may be that the utterances of great jurists and statesmen like Holmes, Washington, Lincoln, Jefferson, Stone, Brandeis, Cardozo and Murphy who have undoubtedly helped to formulate public policy ought to have the same persuasive influence in judicial interpretation accorded legislative history.

The bedrock of American policy and legal thought as expressed by its chief spokesmen and written in our basic legal charters is that all men are created equal, that the sanction of law is denied to racial discrimination. Equality is based on the universal principles of justice and on the natural, immutable, moral law and the unchanging law of God. If the United States is to continue as the chief democratic power in the world, its highest court must clearly, courageously and without dogma or legalism reaffirm these basic truths in practical, not technical or theoretical terms. "The fundamental principles of our legal system are not technical concepts. They are as universal as the Christian philosophy that conceived them. They are understood by school children who may not be able to explain them. They have been the basis for social and economic crusades by the rank and file who, without comprehending their origins or their technical aspects, only know that they call for the fundamentals of fair play and decency. They have been rallying points for aroused communities who need no lawyer's brief or citation of precedents to clinch their contention that the American way of life in some specific particular has been violated."[56]

The preamble of the United Nations Charter reaffirms the faith in fundamental human rights, in the dignity and

[55] *Muscahany v. United States*, 324 U. S. 49, 66.

[56] William O. Douglas, "On Being An American," p. 44.

worth of the human person, in the equal rights of men and women, everywhere, and of nations large and small.

The Charter is a treaty ratified by the Senate and like all treaties so ratified is the supreme law of the land. (Art. VI, U. S. Constitution.) It provides that all signatories thereto shall promote universal respect for and observance of human rights and fundamental freedoms regardless of race and that member nations shall take joint and separate action for that purpose, Art. 55(c) and 56 (59 stat. 1031-1045-1046). This "supreme law of the land" and pledge of our government prevents it from in any wise aiding, sanctioning, or condoning the kind of racial segregation involved in the case at bar. On the contrary it compels the Federal government and all Federal agencies to respect, observe, and promote human rights without racial distinction.

The Commission and court below in validating the Commission's finding have condoned the respondent's discriminatory regulation thereby violating the Federal government's obligation under the charter and preventing its own citizens from practising tolerance and living together in peace as neighbors as proclaimed by the Charter. The achievement of the objectives of the Charter have been construed by the courts. *Nielson* v. *Johnson*, 279 U. S. 47, *Hurd* v. *Hodge*, 162 F. (2d) 233 (Justice Edgerton's dissent).

In Canada in November 1945 in the case of *In Re Drummond Wren*[57] which held restrictive covenants void as against public policy, the Supreme Court of Ontario rested its decision upon the United Nations Charter. Justice McKay speaking for the Court said that it is a well recognized rule that courts may look upon public law as an aid in determining public policy. Said he: "First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified." This decision

[57] 4 D. L. R. 674.

compels attention as a landmark in international law and as meeting the test of Mr. Henry Stimson: "The moral judgments case by case of the civilized nations of the world."

We have ratified the United Nations Charter and surely this is a landmark of persuasive precedent in international law which the United States as moral leader of the world should follow. We have the choice of witnessing the demise of racial segregation or the inquest of democracy.

"Today American citizenship is one of the few remaining symbols of human hope throughout the world. It is a prized possession. It is a sacred covenant passed on by the Founders of this Republic. The Founders never referred to or had in mind anything but one type of citizenship for all. There must not grow up in this country any second or third class citizenship. There is only one class of citizenship in this nation; there is no room for any inferior grade. Where one has been allowed, the result has been the downward spiral of disunity. Then hate and intolerance have been incorporated. Under those conditions the enemies of democracy invariably have risen to power." [58]

"The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message, 'Take heed what thou doest, for this man is a Roman' ". [58a] Negroes are American citizens; this Court should take heed what it does to them. They are entitled under law to more than improved, separate inequality. They are entitled to complete equality.

The official and traditional public policy of the United States against discrimination based on race is embodied in all of our basic charters of government and treaties, [59]

[58] Douglas, "On Being An American," p. 42.

[58a] Mr. Justice Jackson, concurring in *Edwards v. California*, 314 U. S. 160.

[59] The Declaration of Independence; The Constitution of the United States, Amendments 5, 13, 14 (Section 1), 15 (Section 1); Potsdam Agreement.

statutes,[60] court decisions,[61] international compacts,[62] presidential proclamations,[63] as well as in the Charter of the United Nations. The regulation involved is so clearly contrary to this policy that the judgment of the court below should be reversed.

In the face of this public purpose and policy of our government as set forth, announced to, and relied upon, by the peoples of the world and believed in by the majority of our citizens, we cannot ignore the feeling of cold guilt and the world's accusing glance. The compelling sum-

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[60] Rev. Stat. 1977 (8 U. S. C. 41); Rev. Stat. 1978 (8 U. S. C. 42); Rev. Stat. 1979 (8 U. S. C. 43); Rev. Stat. 2004 (8 U. S. C. 31); 14 Stat. 27; 17 Stat. 13; 43 Stat. 936 (28 U. S. C. 225); 49 Stat. 1027 (28 U. S. C. 400); 59 Stat. 1045; 59 Stat. 1046; 59 Stat. 1213; Rev. Stat. 5510.

[61] *Steele* v. *Louisville & Nashville Ry. Co.*, 323 U. S. 192: "discriminations based on race alone are obviously irrelevant and invidious." Mr. Justice Murphy concurring (at p. 208): "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it whenever it appears in the course of a statutory interpretation." *Korematsu* v. *United States*, 323 U. S. 214, 216: " . . . to begin with . . . all legal restrictions which curtail the civil rights of single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restriction; racial antagonism never can." *Hirabayashi* v. *United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Smith* v. *Texas*, 311 U. S. 128, 130; "For racial discrimination . . . in . . . jury service . . . is at war with our basic concepts of a democratic society and a representative government." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374; ". . . hostility to the race . . . to which the petitioners belong—in the eye of the law is not justified. The discrimination is, therefore, illegal . . ." *Edwards* v. *California*, 314 U. S. 160, 185 (Justice Jackson concurring): "Race, creed or color is a neutral fact—constitutionally an irrelevance."

[62] The United States adopted a resolution presented at the Eighth International Conference of American States at Lima, Peru, in 1938, which read: "1. That in accordance with the principle of equality before the law, any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently is contrary to the political and judicial system of America."

[63] George Washington's Letter to Hebrew Congregation, 30 Washington's Letters, Book 19. President Truman's address, 38th Annual Conference of National Association for the Advancement of Colored People, 93 Congressional Record, A3505, *The Washington Post*, June 30, 1947. Report of the President's Committee on Civil Rights, "To Secure These Rights", Executive Order, H9808, December 5, 1946. (11 F. R. 14153).

mons of history demands that the action of the Federal government as evidenced by the Commission and the court below should be repudiated by this Court.

D. Segregation on account of race is contrary to the philosophy of our government.

(1) The Doctrine of "Separate But Equal" Is A Myth.

Equality and equal justice are the order of nature and the law of God upon which the government of the United States rests. Agencies of the government and the courts should not therefore, frustrate the basic design of our original charters of government in the achievement of universal and uniform justice and equality. The real issue is not whether equality can or cannot be attained. The real issue is whether the law which is "what the judges say it is", by sanctioning segregation and discrimination, should assist in making its attainment more difficult, thereby delaying the fruition of the purposes of our government "to form a more perfect union, establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity". "The nations of our time cannot prevent the conditions of men for becoming equal".[64] A nation "conceived in liberty and dedicated to the proposition that all men are equal" cannot long endure either on legal, philosophical or moral grounds if its highest court says equality is unattainable under the law as it is and that it must await congressional action before it can reconsider the false doctrines grafted upon our basic law, namely "separate but equal" and "substantial equality", which were developed solely for the purpose of segregating Negroes on account of their race.

The Declaration of Independence says: "We hold these truths to be self-evident, that all men are created equal,

[64] De Torqueville, "Democracy in America."

that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men deriving their just powers from the consent of the governed". We need go no farther. We need no legislation. These self-evident truths are not derived from government but from the minds and wills of the people. They are not matters of geography or politics or race. They come from the natural moral order. They need only to be sanctioned by this court and made equally and fairly applicable to every man. They are the distilled experience and wisdom of the ages unshakably rooted in the moral and religious laws on which our government rests. Our laws proclaim the equality of men.

Federal agencies cannot check the free mobility of Federal citizens in interstate transportation any more than they can check the interchange of ideas. When they single out an individual and compel him to sit in an "assigned space" (R. 265) in enforced privacy, they are guilty of domestic totalitarianism. Negroes like other citizens have the right to free, mutual exchange and intercourse in ideas, in skills acquired at the work bench in an industrial plant, or to seats in a dining car. Such commerce in personal expressions is essential to the American way of life and the exercise of the individual's mind and will in the pursuit of happiness. Governmental action cannot interfere with the right of individuals to "trade their talents in the world." The state has no power over or access to the personal motives, initiatives, and expressions unless they infringe or trespass on others. The function of the state is with public things, the republic and *res publica*.[65]

The question is not whether Negroes as Federal citizens are herded into the hottest corner of the diner at one table, or in a separate dining car with fifty tables because the Commission thinks it is efficient and necessary. It is a question of free use of the mind and will and choice in a

[65] Paul McGuire, "There's Freedom for the Brave," p. 117.

democracy. The central issue is whether the United States as the nexus of the world's moral and political order will practice and apply to all citizens the principles of democracy, quarried out of the solid rock of justice and Christianity by the founders of our Republic, and transmitted by them to posterity. It is a question as old as man, a question of the value of our religious beliefs, of the value and the ineffable dignity of the human personality. These are the questions from which our democracy derives, historically interlocked as it is with religion. Color or race is antithetical to these questions. There is no such thing as separate equality. The idea is a travesty upon religion and democracy.

The Commission allows the railroad to hide under old devices such as to "keep peace and harmony" (R. 170); convenience of railroads (R. 213). What about the convenience and liberties of passengers? Neither the Commission nor the courts as agencies of the Federal government should perpetuate these specious arguments by sanctioning the discriminatory regulation here. To do so is to condone and entrench discrimination based on race. "Disregard of civil liberties by private groups is sometimes understandable. But courts and their officers have special responsibilities to maintain these rights. What they do sets the tone for the whole community. It is in and around the courtrooms of the land, not in the history books, that the vitality of the Bill of Rights is to be found."[66] The universal and inalienable rights which our government is dedicated to maintain are no grants of privilege from the state, conditioned upon the irrelevance of race, color, or creed.

Because the action below was governmental action, inconsistent with the public policy of the United States, the finding of the Commission and the decree of the Court below should be set aside.

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[66] William O. Douglas, "On Being an American," p. 103.

IV. Segregation is Discrimination.

Segregation is discrimination, not only because inequality invariably accompanies segregation, but because the very idea of enforced separation by race casts a stigma upon persons who, by accident of birth, belong to a "race from which there is no way to resign".[67] Discrimination has been defined as "the act of distinguishing; the act of making or observing a difference; distinction, as the discrimination between right and wrong; the state of being discriminated, distinguished, or set apart."[68] A person does not have to be entirely denied a privilege or a right in order to be discriminated against. A discrimination may exist when race is the sole basis for a distinction or differentiation. A carrier discriminates when it differentiates between passengers according to their race and distinguishes between them in accommodations set apart on the basis of race.

The carrier claims it has provided dining car facilities in excess of the number of Negro passengers normally anticipated to seek service. If facilities were provided sufficient to accommodate every passenger, white and Negro, without the necessity of any passenger's waiting for a vacancy in a particular section of the car designated for persons of his race, as long as separate facilities are provided on the basis of race, and though the service provided may be identical in every detail, that differentiation is discrimination. The Report of the President's Committee on Civil Rights states (p. 82):

> We believe that not even the most mathematically precise equality of segregated institutions can be properly considered equality under the law. No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of

[67] Mr. Justice Jackson, dissenting in *Korematsu v. U. S.*, 323 U. S. 214, at p. 243.

[68] Webster's 20th Century Dictionary, p. 485 (1939).

daily living creates inequality by imposing a caste status on the minority group.

In *Railroad Co.* v. *Brown*, 84 U. S. 445, cited but not followed in *Plessy* v. *Ferguson*, a railroad's provision of separate but equal cars for passengers of different races was discrimination. An act of Congress enabling the railroad to extend its road to Washington, D. C. provided "that there shall be no person excluded from the cars on account of color". A Negro passenger, having been ejected from a white coach, was forced to occupy a car set aside solely for Negroes. This "Jim Crow" car, according to the carrier's testimony, was equal in comforts to the other cars. To the contention that the Negro passenger had not been excluded because a separate but equal car had been provided, the Court replied:

> The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them. This is an ingenious device to evade compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any limited sense. There was no occasion in legislating for a railroad company to annex a condition to its grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of anyone an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carriers—south as well as north—to transport, if paid for it, all persons whether white or black, who should desire transportation. It was the discrimination in the use of cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race should not ride in the cars at all. Congress, in the belief that the discrimination was unjust, acted. It told the company, in sub-

stance, that it could extend its road within the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, must be placed on an equality.

Segregation by carrier regulation, like residential segregation by private covenant, is also an ingenious device which discriminates against Negro passengers, and, in both instances, is designed to accomplish what this Court has held a state cannot do. The Interstate Commerce Act is particularly aimed at discrimination, whatever form it may take. In *U. S.* v. *Milwaukee Refrigerator Transit Co.*, 142 F. 247, the Court stated: "It is manifest that the purpose of the statute regulating interstate commerce is to strike through all pretenses and all ingenious devices to the substance of the transaction, and it is the duty of courts to recognize and carry into effect such purpose in suits for their enforcement".

In dealing with certain property rights the concept of substantial equality or separate but equal has not been applied by this court where property rights are involved and the restraint is based solely on race. If a Negro wishes to buy, sell, or occupy a particular piece of property, this Court has consistently ruled that neither a state nor the federal government may restrict that choice solely because of race, because to do so "is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing state interference with property rights except by due process of law". *Buchanan* v. *Warley*, 245 U. S. 60, 82. That some choice is left of property substantially or identically equal does not justify a restraint imposed solely because of a person's race or color.

"The Emancipation Proclamation broke the legal bond of slavery but not the social one. The progress of Negro emancipation is infinitely slower and it is not yet accomplished." [69] Negroes still suffer many infirmities that were

[69] Walter Lippman, *Preface to Politics.*

incident to slavery, because of the devastating effects of its successor, segregation. The experience of the United States Army indicates thirty percent illiteracy among Negroes eighty-six years after emancipation. Two-thirds of the Negroes in the south are still disfranchised in defiance of law. Two-thirds of the Negro population of the United States have incomes below the standard of decent living with the consequent over-exposure to disease, crime and death. Four and five tenths (4.5) Negro mothers of every one thousand die in childbirth, compared to one and seven tenths (1.7) white mothers. Ninety-eight Negroes of every one hundred thousand die of tuberculosis compared with thirty-two and seven-tenths of every one hundred thousand whites. In the cotton belt, four million Negroes live in primitive squalor unchanged since 1876. In recreation, in travel, in simple human rights guaranteed under our laws to all alike, this Court should take judicial notice of the violations and deprivals of rights of Negroes beyond those of other groups. "Assigned Space" is enforced privacy which is but another name for the myth of separate but equal, is Herrenvolk and the maintenance of white supremacy which are going down under the rising tide of scientific fact, and the principles of international law and justice.

Mr. Justice Douglas has said: "The sense of belonging is important to man. The feeling that he is accepted and a part of the community or the nation is as important as the feeling that he is a member of a family. When he feels he does not belong, he is not eager to assume the responsibilities of citizenship. Being unanchored, he is easy prey to divisive influences that are designed to tear a nation apart or to woo it to foreign ideology."

The rights here involved, freedom to sit where one pleases, freedom from enforced and humiliating privacy based solely on race which the regulation requires, need no codification or legislation. "Assigned space" in enforced privacy is discrimination.

Color or race is "constitutionally an irrelevance"[70] Separate equality is a travesty upon democracy. To perpetuate such a myth is a dishonest evasion of morals and law. It compels variation for particular persons and sets up one rule for white and Negro, as absurd as one rule for rich and for the poor, for the favorite at court and the countryman at plow.[71] It is a denial of the constitutional heritage of equality and liberty, "only a promise to the ear, to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will"[72]

The enforced privacy of the defendant's regulation connotes a brand of racial inferiority and discrimination under which Negroes suffer as only those who have suffered the loss of the dignity of the human person can understand and appreciate. The moving anguish and humiliation which Negroes suffer is tragic experience.[73]

Segregation based on race is un-American. It is false in law, in science, and in morals. It is contrary to all of our ethical and legal principles and it defies the will of God. This Court should strike the regulation down because it is illegal and because it is ammunition for our foes in our struggle against Communism. While law needs the spiritual backing of the community, law can be and is a positive force in the spiritual advancement of the community. Law to expedite the advancement of the community, to internationalize human rights and universalize equality, need not await the unanimous blessing of the community before it becomes effective. "Law, like the traveler, must be ready for the morrow. It must be a principle of growth."[74]

Legal codes and court decrees tend not only to settle disputes, they are aids to wisdom and to education which are

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[70] Mr. Justice Jackson, concurring in *Edwards* v. *California*, 314 U. S. 160, 185.

[71] John Locke, the Treatises of Government, Book II, Chapter XVIII.

[72] Mr. Justice Jackson's concurring opinion in *Edwards* v. *California*, *supra*.

[73] See Appendix, page —.

[74] Cardoza, "Growth of the Law," p. 61.

deterrents to those community mores and individual prejudices which result in discriminatory practices as are here involved and from which a large segment of Americans have suffered too long. These rights, based on universal and eternal justice, simple human decency and equality are already guaranteed in all our basic law. The recognition, interpretation and reaffirmation of these established rights must be made exquisitely precise like the north star on a moonlit night. Justice Holmes said: "The law is the witness and external deposit of our moral law. Its history is the history of the moral development of the race." The wisdom and enforcement of law are beyond judicial purpose but its lucid interpretation and its constant and courageous affirmation are not. Thus only will the seed of justice and equality for all planted by this court grow into a harvest of moral leadership which will receive the universal assent and acclaim of all men and all nations. And thus only can we avoid repressing freedom which is the chief glory of mankind, the denial of which is to deny and defy the human spirit.

The case at bar requires searching judicial inquiry and a courageous declaration of the rights of free men. In his concurring opinion in *Hurd* v. *Hodge*, 334 U.S. at 36 Mr. Justice Frankfurter squarely met the issue when he said that the petitioner's rights were violated "not for any narrow technical reasons, but for considerations that touch rights so basic to our society, that after the Civil War, their protection against invasion by the states was safeguarded by the Constitution. This is to me a sufficient and conclusive ground for reaching the Court's result." In extending to appellants the protection to which they are entitled this Court, likewise, should appraise reality squarely and not be guided by the technical rules of the law. *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. (2nd) 212; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 213 U.S. 287, 61 S. Ct. 552. It is the substance of appellant's rights and the spirit of the American ideals of unqualified

equality and liberty that are important here, not form outmoded, or precedent misused. It is simply a matter of natural, inherent, equal justice under law.

The Court in *Holden* v. *Hardy*, 169 U.S. 366, 18 S. Ct. 383, 385, said: "This Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; . . . that restrictions which have formerly been laid upon the conduct of individuals or of classes of individuals, had proved detrimental to their interests", and in *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, this Court said: "These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence, but by authority of our commissions. We cannot, because of modest estimates of our competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

The judicial function encompasses the duty of guaranteeing as far as it can, those conditions and practices which equiality of treatment and opportunity between individual and government and between individual and individual require. In the history of the development of our legal system and our struggle for justice we have seen exploitation and oppression of minorities crumble under the impact of unchanging, eternal, "self-evident" truths embodied in some of the deathless opinions of this Court. Justice is not the preservation of status quo. Disraeli said: "Justice is truth in action." The inequality, and injustice, based on race alone, of the regulation in this case is invidious under the Constitution and should be destroyed. Equal justice under law for all men however lowly and disadvantaged is the true and final meaning of human experience. The jurist or court which condones, sanctions, justifies or validates inequalities, prejudices and injustices is not a true advocate of justice and frustrates and stultifies the judicial process. "What we seek is not justice under law as it is. What

we seek is justice to which law in its making should conform.'"[75]

The doctrine of equality is the oldest on record. No distinctions are implied from the Mosaic account of Creation to the latest definitions. It is immutably a part of the law of nature, a natural right appertaining to all men in their right of existence, and in their right of action as individuals for their own comfort and happiness which is not injurious to natural rights of others. Natural rights are the foundations of civil rights. As Thomas Hobbes said in his Leviathan, "Nature hath made men so equal that one man cannot, when all is reckoned, claim any benefit to which another cannot pretend." That is also the law of the Gospel.

The central issue in this case arises from a conflict between principles fundamental in our system of government which have not as yet been unequivocally met except in occasional dissent. This case involves not only legal questions which command the critical attention of all who believe that law is really sovereign when it ripens into social justice. Our chief concern should be to equalize social forces in the conflict and "free struggle for life"[76] operating upon Negroes in their attempt to achieve equality. It involves the position of the United States in international leadership. Democratic preachments and democratic practice in the United States are under the spotlight of world scrutiny in the contest of competing and irreconcilable ideologies which compel new judicial inquiry and interpretation of our basic laws and the removal of this intolerable restriction on rights of Negroes.

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[75] Cardoza, Growth of the Law, p. 9.

[76] Mr. Justice Holmes speaking for the court in *Vegelhan* v. *Gunther*, 167 Mass. 92.

CONCLUSION.

A private corporation undertakes to segregate Negroes on a purely racial basis, a basis which has no reasonable relation to the subject matter of the act under which they attempt to make the arbitrary classification. The Commission and court below, representing the government of the United States has sanctioned and condoned this regulation notwithstanding the provisions of the Interstate Commerce Act, and notwithstanding "Our Constitution is color blind". The effect of segregation by private organizations sanctioned by the federal government serves only to imbed the specious separate but equal doctrine in our law, a doctrine which is false and contrary to the philosophy of the founders of our Republic. Negroes have the right to be free from segregation and discrimination because of race, the right without discrimination on account of race to enjoy all the privileges that inhere in freedom, *Hodges* v. *U. S.*, 203 U.S. 1 (1906), and the right of "freedom from outraged feelings as well as restraints on person", *Cummings* v. *State of Missouri*, 4 Wallace (U.S.) 277. The kind of segregation imposed by the regulation is discriminatory just as it is in hotels, theaters, and other public carriers. This type of discrimination, infringing the right of free selection and the right not to be publicly humiliated, cannot be sanctioned by the federal government. *Marsh* v. *Alabama, supra; Shelley* v. *Kraemer, supra.* The enforcement of this regulation by government action is clearly violative of the Interstate Commerce Act, the Constitution and laws of the United States, and principles set forth in more recent decisions than the decision in *Plessy* v. *Ferguson, supra.*

The enforced segregation sanctioned by the Commission and Court below have deprived the petitioner of his inalienable right to liberty and pursuit of happiness, more specifically to any available seat, the same as other passengers. That fact is crystal clear and unequivocal. Identical table cloths and silverware are not the essence of equality. The

identical right of choice of seat, location of table and time of eating such as are available to other passengers, the right not to be set apart and embarrassed on account of race, are the essence of individual rights and liberty. Common honesty compels us to admit the truth of Mr. Justice Harlan's dissent in *Plessy* v. *Ferguson, supra,* "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." The only purpose of segregation is to keep Negroes to themselves, in their place.

"How often is natural propensity to society disturbed or destroyed by the operation of government. When the latter, instead of being ingrafted on the principles of the former, assumes to exist for itself, and acts by partialities of favor and oppression, it becomes the cause of mischiefs it ought to prevent."[77]

No amount of technical maneuvers or constitutional ritual can conceal the clear federal action in this case. This court must not allow the separate but equal doctrine further to endure as a yoke around the necks of the American people who want to practice democracy and Christianity if not hampered in that practice by their government. Government classification of citizens on the basis of race is discrimination. Mr. Justice Harlan went to the root of the matter, in the question he put in *Berea College* v. *Kentucky*, 211 U.S. 45:

> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?

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[77] Thomas Paine, "Rights of Man," Part II, p. 406.

Our government is a federal republic created for the purpose of making individual advancement easier. Negroes have great faith in their capacity for self government. That faith requires "the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion."[78] He must be unfettered by status, always inimical to freedom; he must be unhampered by government enforcement of race segregation which will rot the soul of our nation.

WHEREFORE it is submitted that the decision of the court below should be reversed.

Respectfully submitted,

BELFORD V. LAWSON, JR.
JAWN SANDIFER.
MARJORIE M. MCKENZIE.
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[78] Lord Acton, "Essay on the History of Freedom in Antiquity."

APPENDIX.

Interstate Commerce Act, 49 U. S. C.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to Chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establish-

ing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15 (1). Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chap-

ter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

COLLEGE OF EDUCATION AND INDUSTRIAL ARTS
MAINTAINED BY THE STATE OF OHIO
CHARLES H. WESLEY, PRESIDENT
WILBERFORCE, OHIO

Office of the Administrative Dean

June 11, 1949

Attorney Belford V. Lawson, Jr.
2001 Eleventh Street, N.W.
Washington 1, D. C.

My dear Brother Lawson:

I have before me your letter of May 24, 1949, with reference to my experiences with the jim-crow dining car regulations of the Southern Railway and other roads in the South. I wish to advise that I have never eaten behind the curtain provided in dining cars which separate the tables

where Negroes may eat from the tables where all other human beings may eat. Several times I have had meals served in the pullman car to avoid the humiliation. At other times I have been fortunate enough not to eat at all rather than sit behind the curtain. I have talked to a goodly number of my friends and acquaintances who travel a good deal and I am advised in varying details that to them the separation by the curtain does something somewhat different from other jim-crow experiences they have had. In the first place, it seems so senseless that white persons should be satisfied to be served, by Negro waiters, food that has been cooked and prepared by Negro cooks, but refuse to eat in the same car with other Negroes unless there is some symbol of the inferior status imposed by circumstances over which Negroes themselves do not have control.

In the second place, segregation in dining cars is made overt by the circumstance that all the people in the car are in the same room with an inescapable symbol of the difference in esteem in which Negroes are held by the organized society in which they live and by their governments. It tends to place the colored persons not only at the disadvantage of being segregated and humiliated, but to exhibit his unhappy status to those who pass through or come into the car and those at stations through which the train passes. It is to be noted that the situation here is a little different, though of the same order of unacceptability, from the jim-crow car itself. Ordinarily the better class of both races ride in pullman cars and eat in diners but the badge of race discrimination is burned in by the circumstance that no matter what success in life one has attained, so long as he is of African descent, he must ride behind this curtain of shame. Negro teachers, lawyers, doctors, legislators, judges, and diplomats, no matter what their attainments, are exhibited to the by-standers as separate and different from all other humanity.

I join you with other liberal men and women of this country of all races and nationalities in the fervent hope that the curtain if infamy will be banished by the Supreme Court of the United States.

Sincerely yours,

H. H. Long

HHL:ev

HOWARD UNIVERSITY
WASHINGTON 1, D. C.

May 25, 1949

Department of History
Mr. B. D. Lawson, Jr.
General President, Alpha Phi Alpha
2001-11th Street, N. W.
Washington 1, D. C.

Dear Brother Lawson:

I am delighted to know that definite progress is being made with respect to the validity and reasonableness of the dining car regulations of the Southern railway. In response to your request I am submitting the following statement which you may use in any way you deem best:

Dr. Rayford W. Logan, officer of the United States Army in France in World War I, head of the Department of History at Howard University, world traveller, author of several books and member of the United States, National Commission for UNESCO, states that the regulation which compels him to eat behind a curtain or partition in a dining car is the most humiliating and degrading experience in his entire life in the United States. He further states that by training and temperament it is impossible for him to be a communist but if there were any one thing in American society that would lead him to communism, it is the impact of the insult to his dignity as an individual arising from the dining car regulations.

I hope that this statement will strengthen your case and that you will receive many others like it.

With all good wishes for your successful prosecution of this case, I am,

Sincerely yours,

RAYFORD W. LOGAN
Head, Department of History

Mary McLeod Bethune
Founder-President

Jeanetta Welch Brown
Executive Director

NATIONAL COUNCIL OF NEGRO WOMEN, INC.

(Affiliated with the National Council of Women of the United States, Inc., and International Council of Women of the World)

1318 Vermont Avenue, Northwest
Washington 5, D. C.
Telephone: COlumbia 4491

June 9, 1949

Mr. B. V. Lawson, Jr.
Alphi Phi Alpha Fraternity, Inc.
2001 11th Street, N. W.
Washington 1, D. C.

My dear Mr. Lawson:

During my extensive travels throughout the South I have encountered a variety of experiences demonstrating the discriminatory character of dining car segregation. This practice is offensive to me as an American citizen and as a member of the racial minority group with which I am identified. Naturally, I share with other Negroes the feeling of personal resentment induced by the knowledge that the partition is deliberately designed to imply the superiority of one group and the inferiority of another.

Since it is absurd to assume that facilities provided on this basis can possibly be equal, the practice purely demonstrates a situation in which expenditure of the same sum of money by Negroes does not buy the same facilities, service, and comfort available to others, and represents one of the most grossly unfair aspects of American racism.

There is, of course, a wide variety of reactions on the part of Negroes to this treatment. Many, revoiling from the personal humiliation to which this practice subjects them, forego the privilege of dining car service to which their ticket entitles them. Others face the experience only to emerge with extreme bitterness, frustration and anger, accentuating within them feelings of racial animosity. Those of us, however, who regard manifestations of racism as symptoms of an insidious malady tend rather to be embarrassed for our fellow citizens on the other side of the "curtain" and the flagrant violation of our democracy. Knowing as I do that the majority of decent American people are inwardly shamed and spiritually frustrated by their reluctance to cope with this flagrant violation of their own finer instincts of fair play and Christian ethics, my deepest emotions in situations of this kind are essentially compassionate.

Sincerely yours,

MARY MCLEOD BETHUNE
Founder-President

Women United . . . "A Magazine Dedicated to all Women Everywhere"

FEDERAL HOUSING ADMINISTRATION
RACIAL RELATIONS SERVICE
2011 North Washington
Dallas 4, Texas

June 1, 1949

Attorney Belford V. Lawson
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Sir:

I understand that the Alpha Phi Alpha Fraternity is prosecuting the case of Elmer Henderson vs. United States, et al, in an effort to eliminate the vicious practices of Southern Railroads which require Negro passengers, who seek dining car accommodations, to be served at a table set off by curtain or partition. As one who travels extensively in the interest of the Government I wish to make some comments.

I have been exposed to these conditions many, many times and have never enjoyed equality in service at any time, while seated behind this curtain. Usually these four seats behind the curtain are occupied by whites because of overflow and conjestion while there may be a single seat available elsewhere in the dining car. In the next place, the humiliating inconvenience and discomfort of such separate seats create mental anguish that often affects the gastronomical system. In addition, when these separate seats are not in use by whites during the early period of the meal, the dining car employees occupy them and leave them, usually, in complete disorder.

Because of the discomfiture of such separate eating facilities on most Southern Railroads, many times I deny myself the privilege of a meal, rather than to engage in controversy with the Railroad employees in search of an available seat elsewhere in the dining car.

I am sure that if these facts are presented to the Court they will see that there is no equal protection in these accommodations and will invalidate this nefarious practice.

A. MACEO SMITH
Racial Relations Adviser

AMS/hwb

LINCOLN UNIVERSITY
PENNSYLVANIA

May 26, 1949

Office of the President

Attorney Belford V. Lawson, Jr.
General President
Alpha Phi Alpha Fraternity, Inc.
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Mr. Lawson:

I am glad to learn from your letter of May 24, that the Alpha Phi Alpha Fraternity is prosecuting the case of Elmer Henderson v. United States.

As you may know, I have held positions during the last twenty-five years that have required me to travel widely in the South. One of the reasons that led me to give up what I still regard as a serviceable career in the field of educating Negro youth in that section, was the constant series of demoralizing humiliations to which I was exposed in the dining cars.

I remember one trip from Atlanta to Chicago with Mr. Forrester B. Washington in 1943. On that trip Mr. Washington and I were obliged to stand waiting in the vestibule from near Atlanta to well beyond Chattanooga, waiting for a seat behind the velvet curtain while for a majority of the time the rest of the dining car was practically empty.

The human degradation of sitting down to such a table, and having the stewart contemptuously draw the curtains

so as to hide one's face from the other diners, as though the color in your skin constituted some kind of contagion, or was likely to provoke nauseau, is of such a character that it cannot be described to anyone who has not experienced it.

Indeed, so humiliating is this experience, that I found myself in time unable to eat under such conditions, and I have traveled for hundreds of miles rather than to expose myself to such a practice, so degrading to every rightful concept of the dignity of the human person in the sight of man and God.

Whatever the outcome of your suit, I am thoroughly convinced that you are working in the interest of true Americanism, and for the dawning of that day when this great nation can set forth to the world an example of respect for human personality as convincing as the public utterances of our statesmen in the councils of the United Nations.

Sincerely,

HORACE M. BOND.

HMB/gj

VIRGINIA STATE COLLEGE
PETERSBURG, VIRGINIA

May 26, 1949

President's Office

Honorable Belford V. Lawson, Jr.
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Honorable Lawson:

Time and time again my associates in the field of education with mutual interests and concerns, travelling to and from conferences, conventions, and board sessions are humiliated by regulations requiring separation because of racial origin. Essential communication in the work of education and in other areas is too frequently blocked by

this kind of brutalizing practice. It would be beneficial to the democratic spirit of this land, and to the peoples of all lands who observe us, if this artificial barrier toward normal human understanding and citizenship relations could be once and for all time abolished in the dining cars of our railway carriers.

The one important factor that both "separate but equal" and "substantial equality" overlook is the psychological impact of being forced to assume an air and attitude of restricted privacy in an otherwise publicly-atmosphered dining car situation. It seems clear to me as a citizen, a Southerner, and an educator that there is no reason for this continued anti-social practice. May it be eliminated by a favorable court decision.

Sincerely yours,

L. H. FOSTER,
President.

LHF/bvh

SHAW UNIVERSITY
RALEIGH, N. C.

May 26, 1949

Office of the President

Attorney B. V. Lawson, Jr.
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Mr. Lawson:

I certainly hope that you may be successful in the case in which the validity and reasonableness of the dining car regulation requiring Negro passengers to be served only at certain tables is being contested. As one who travels a great deal, I have to use the dining car most frequently.

The inconsistency of the situation is indicated when on occasion I had lunch in the dining car in the North and later that same day had dinner in the South in the re-

stricted part of the dining car, being served by the same steward and staff in both cases.

On occasions there have been instances when the necessity of sitting on the side of the car with the sun on the table or the shades drawn to prevent the sun from shining has been necessary because the other table for Negroes has been occupied. At the same time, there has been space in the dining car on the shady side but in which I would not be allowed to sit because of the present regulation.

The circumstances have also made it so that frequently Negroes have been crowded at the tables limited to them when there has been additional space for a person to have much more elbow room if the opportunity of eating at more and different tables was extended.

Of course there is the significant factor of difference to indicate that there must be something of contagiousness or undesirable features which means that the Negroes must be grouped in one place, removed from the other passengers in the car. One can certainly not eat in full enjoyment of a meal under such circumstances.

With every good wish, I am

Very truly yours,

ROBERT P. DANIEL,
President.

RPD:p

Buckling Moon—Without Magnolias, pp. 49, 50, 133, 134, 135, 136 (1949), by Doubleday & Co., Inc.

These tragic experiences have gotten into the literature of the era. The effect of segregation on a Negro passenger has been described thus:

"He wondered idly what Ethel had put in the box of lunch for him to eat that evening. He had eaten lunch before he had come to the station. He could, of course, have gone into the dining car that evening, but *of all the*

forms of segregation, the green curtain used to shut off Negroes from the other diners seemed to him the most odious. The few times that he had tried to eat under such surroundings he had found that he was unable to enjoy his food. In fact he had been scarcely able to force the food down his throat and had merely sat there feeling his resentment churning around inside him and finding it almost impossible to restrain it. It made him hate every white face in the dining car, and the last time that this had happened it had made him so nervous that he had quickly left enough money to cover the cost of what he had ordered, plus a tip, and gone back to his compartment, leaving his food untouched."

The experience of another passenger was related as follows: "She went into the diner early, the moment that the waiter stuck his head in the car and announced first call for breakfast. It would be a change from the dingy coach, and, by doing so, she hoped that she would be able to eat by herself. She might even finish before it was necessary to pull the green curtains shutting off the two end tables, which were reserved for Negroes, from the rest of the car.

"She was the first one in the dining car, but as she sat down at the smaller of the two tables the curtain was already drawn, though there were no white people there. Annoyed, she looked down toward the opposite end of the diner, but the steward carefully ignored her, pretending to be busy with his stack of menus. She stared out of the window angrily. • • •

"She was hungry. The evening before, she had eaten in the Washington station rather than undergo *the bother and possible humiliation of the dining car.* But it had been an unsuccessful meal, for although she knew that the train stopped there for forty minutes while it took on additional southbound cars, she was all too conscious of the big clock over the entrance. She was glad that she had not allowed her friends in Washington to come down to

the train to see her; it would only have added to the confusion and made her still more conscious of the fact that here was the starting point of legal segregation. Consequently she had hurried through her meal so quickly that nothing had had a taste of its own; it all was merely something thrown hastily into her stomach to fight off the pangs of hunger.

"The drawn green curtain was at her back, but she was as conscious of it as though she were facing the other way.

"'Couldn't you draw back the curtain?' she asked politely.

"He bent forward and looked out the window.

"'This is Georgia, baby,' he said, 'or didn't you know?'

"'I know that,' she answered, 'but there's no one in here except me.'

"'Look,' he said, 'I don't make the rules.'

"'Then couldn't you ask the steward?'

"'That peck back there don't make the rules either. Anyway, that man's really Simon Legree and he ain mellowed none in the years. Honest, lady, that man is pure evil and there ain a thing I can do.'

"'Not even ask him?'

"'Unh-unh, baby, not even for you. I ask him anything this early in the morning he bite my arm off. I always stay short of him, but until noon I avoid him completely''.

"She shrugged and drank her orange juice, then poured a cup of coffee. It was good, strong the way she liked it. She was conscious of the steward passing and she called out to him.

"'Couldn't you draw back the curtain behind me?'' she asked. 'It cuts off the light and it's really most unpleasant.'

"He turned around and looked at her.

"'The laws of this state are that colored patrons must eat behind that curtain,' he said. 'I don't make those rules, I merely carry them out.'

"'I know that,' she said. 'I'm not blaming you, but since I am the one person in here—'

"'I'm not interested in what you think,' he broke in.

"'I merely—' she protested.

"But he gave her not time to finish. 'I don't care what you merely,' he said. 'If you don't like it, you can leave now. I won't charge you for the orange juice and coffee.'

"She wished now that she had kept her mouth shut. At the other end of the car she saw some white people entering and she hated scenes, but she was in so far now that she could not possibly withdraw without making her position clear.

"'All I ask is a little courtesy,' she said slowly. 'I've done nothing to deserve abuse.'

"'You want me to call the conductor? He'll put you off at the next whistle stop, if that's what you want. Or would you rather talk to a policeman in Jacksonville? I don't have the time nor the patience to argue with you. If you don't like the way we do things down here why didn't you stay up North?'

"He turned abruptly and walked past her down the aisle to where the white people were waiting. She felt the tears rise to her eyes and the sting of his words across her face like a lash. In a moment she knew that she was going to cry and, like a wound-up mechanical toy, once started, she would stop only when she had run down. Blindly she got up from her chair and hurried out of the car."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES

This proceeding was brought by appellant to set aside an order of the Interstate Commerce Commission. As required by statute,[1] the United States was named as a defendant. The case is here on appeal from the judgment of the district court dismissing appellant's complaint, and the United States is a nominal appellee. Since the United States is of the view, however, that the order of the Interstate Commerce Commission is invalid, this brief sets forth the grounds upon which it is submitted that the judgment of the

[1] See Section 2322 of Title 28, United States Code.

district court is erroneous and should be reversed. See *Mitchell* v. *United States*, 313 U. S. 80, 92; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574, note 6.

OPINIONS BELOW

The opinion of the specially constituted district court (R. 248) is reported in 80 F. Supp. 32. The report of the Interstate Commerce Commission (R. 4) appears at 269 I. C. C. 73. A prior opinion by the district court in this proceeding (R. 63) is reported in 63 F. Supp. 906, and a prior report of the Interstate Commerce Commission (R. 184) appears at 258 I. C. C. 413.

JURISDICTION

The judgment of the district court was entered on October 28, 1948 (R. 265). The petition for appeal was filed and allowed on November 17, 1948 (R. 266, 269). The jurisdiction of this Court to review by direct appeal the judgment entered in this case is conferred by Title 28, United States Code, Section 1253. Probable jurisdiction was noted by this Court on March 14, 1949 (R. 278).

STATUTE INVOLVED

Paragraph (1) of Section 3 of the Interstate Commerce Act as amended, 24 Stat. 380, 54 Stat. 902, 49 U. S. C. 3 (1), provides as follows:

> It shall be unlawful for any common carrier, subject to the provisions of this

part[2] to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

QUESTION PRESENTED

Whether the railroad's dining-car regulations, approved by the Interstate Commerce Commission, are unlawful because they subject passengers to discrimination and inequality of treatment, solely on grounds of race or color.

STATEMENT

On May 17, 1942, appellant, a Negro, was traveling as a first-class Pullman passenger on the Southern Railway from Washington, D. C.,

[2] The words "this part" refer to part I of the Act (see 49 Stat. 543), which applies to common carriers by railroad (49 U. S. C. 1 (1)).

to Birmingham, Alabama. He was making this trip as a field representative of the President's Committee on Fair Employment Practices, War Manpower Commission, to investigate violations of Executive Order No. 8802 alleged to have occurred in war industries in the Birmingham area. (R. 90–91, 97–99.)

When appellant entered the diner on the day in question shortly after it was opened for service at 5:30 p. m., white passengers were sitting at the two end tables which the railroad conditionally reserved for Negroes but there was at least one vacant seat at these tables. The dining-car steward told him that he could not then be served, and promised to send him word in his Pullman car if the end tables became vacant. Appellant came back to the diner at about 7 p. m. and again at about 7:30 p. m. At both times white people were eating at the end tables, as well as throughout the car, and appellant was told that he could not be served.[3] The steward never notified appellant that the end tables had become vacant, and at about 9 p. m. the diner was detached from the train. (R. 90–92, 190.)

It had long been the railroad's practice not to serve white and colored passengers at the same

[3] Appellant testified that on his first or second trip to the diner the steward said to him, "I am supposed to ask you if you will be served in your Pullman seat" (R. 95). Appellant declined the suggested tray service at his Pullman seat (R. 96).

time. The latter, "being in the minority," were served either before or after white passengers had eaten. With the increased passenger traffic in 1941 due to defense activities, one mealtime tended to run into the next, "leaving no time in which to serve Negro passengers." To meet this situation, the railroad installed curtains which might be drawn from the side of the car to the aisle so as to separate the two tables nearest the kitchen from the adjoining tables.[4] The railroad's regulations, as supplemented in August 1942, provided for drawing the curtains into position before mealtime and placing "Reserved" cards on the two curtained tables.[5] If all other seats had been taken before any colored passenger entered the diner, "the curtain should be pushed back, cards removed and white passengers served at those tables."[6] Any colored passenger appearing later was to be advised that he would be served

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[4] One of the railroad's waiters testified that this change permitted colored passengers to be served more readily, "Because before they had the curtains, they didn't have no way to 'Jim Crow' them off from the whites" (R. 145).

[5] The regulations which the railroad adopted in July 1941 and the supplement thereto adopted August 6, 1942, are set forth in the Appendix, *infra*, pp. 67–68.

[6] The railroad's vice-president in charge of transportation and operation testified that these arrangements were made "so the Jim Crow end would be vacant until every other seat was taken in the dining car" (R. 167).

as soon as the end tables were "vacated."[1] (R. 186–187.)

In October, 1942, appellant filed a complaint with the Interstate Commerce Commission charging that the railroad's refusal to serve him solely because of his race discriminated against him in violation of the Constitution and Section 3 of the Interstate Commerce Act (R. 80–82). He asked that the railroad be required to provide in the future non-discriminatory dining car service for Negro passengers, and for an award of damages (R. 83). The Commission ruled that although appellant had been subjected to undue prejudice and disadvantage on the particular trip, the railroad's dining car regulations met the requirements of the Act and that therefore no cease and desist order should be entered against the railroad (R. 190–192). On the question of damages, the Commission ruled that there could be no award because there had been no proof of "pecuniary loss" (R. 193–194). It accordingly entered an order dismissing appellant's complaint (R. 195).

On suit to set aside the Commission's order, the damage issue was eliminated from the cause by appellant's concession that the Commission's de-

[1] Of course, if additional white passengers were seated at the end tables as fast as those eating there finished and left, as was done when appellant was seeking service, this prevented Negro passengers from obtaining any dining car service (R. 75, 125).

nial of damages was not reviewable (R. 68).[5] As to the primary issue in the case, the validity of the railroad's current dining car regulations, the court below (sitting as a three-judge district court) held that the regulations were unduly prejudicial under the principles laid down in *Mitchell* v. *United States,* 313 U. S. 80, in that the curtained end tables were only conditionally reserved for Negro passengers whereas all other seats in the car were unconditionally reserved for white passengers (R. 74–78). The court therefore set aside the order entered by the Commission and remanded the case to it for further proceedings (R. 79–80). 63 F. Supp. 906.

On the reopening of the Commission hearings the railroad introduced in evidence new dining car regulations which it had adopted effective March 1, 1946.[6] They provide for reserving exclusively for Negro passengers one of the end tables nearest the kitchen, that on the left side of the aisle facing the buffet and seating four passengers. The curtain separating this table from the next one is to remain drawn to the aisle while meals are being served and a "Reserved" card

[5] This concession was made prior to the recent decision in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, holding that an order of the Commission dismissing a claim for damages may be reviewed by ordinary one-judge district courts but not by three-judge courts set up under the provisions of the Urgent Deficiencies Act of 1913.

[6] The regulations are set forth in the Appendix, *infra,* p. 68.

is to be kept on the table except when it is occupied. All other tables are reserved exclusively for white passengers. (R. 198, 223.)

As to the table reserved for colored passengers, the railroad planned to install, in place of the curtain, a permanent partition about five feet high and to convert the space on the opposite side of the aisle into an office for the steward equipped with cash register and other needed supplies and materials (R. 199–201).[10] At the time of the hearing these changes had been made in only one diner[11] but the alterations were to be made in other cars as they were sent to the shops for repairs (R. 201). The railroad, in adopting the new regulations and in planning structural changes, had in mind conforming with both the decision of the district court condemning its prior regulations and the requirements of state segregation laws (R. 202, 205, 208).

The four seats set aside for Negroes represent 8.33% of the 48 seats in the diner (R. 9). Studies made by the railroad, covering an 11-day period and a 10-day period, of the meals served in its diners on the run between Washington, D. C., and Atlanta, Georgia, showed that the meals served to Negroes constituted, for the

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[10] A similar five-foot partition was to separate his "office" from the next table (R. 199).

[11] For illustrative photographs, see Exhibits 4–7, R. 224A–224D.

respective periods, 3.06 % and 4.22% of all meals served (R. 215, 217, 225, 237).

The Commission, with two members dissenting, upheld the validity of the amended regulations (R. 4–11) and the court below, with one judge dissenting, dismissed appellant's suit to set aside the Commission's order (R. 248, 261, 265). The court held that neither the Constitution nor Section 3 of the Interstate Commerce Act prohibited segregated dining car service for Negroes if, as was the case, the segregated accommodations were proportionate to the demand for dining car service by members of the Negro race (R. 253–260).

SUMMARY OF ARGUMENT

The order of the Interstate Commerce Commission approving the dining car regulations involved in this case is invalid on constitutional and statutory grounds. Both the Constitution and the Interstate Commerce Act give all persons traveling on interstate carriers the right to equal treatment, without being subject to governmentally-enforced discriminations based on race or color. Contrary to the holding below, the obligation of carriers to provide equality of treatment means equality as between individuals and not as between racial groups. The regulations are clearly unlawful in that they permit discrimination against individual passengers, white as well as colored, in situations

where available accommodations are denied solely on grounds of race or color. Beyond that, however, the Commission's order is invalid because it attempts to place the sanction of law upon a system of compulsory racial segregation which denies colored passengers the equality of treatment to which they are entitled under the Constitution and the Interstate Commerce Act. This case does not involve segregation by private individuals. The decisive factor here is that the segregation regulations bear the approval of an agency of government.

Segregation as enforced by the regulations imports the inferiority of the Negro race. Enforced racial segregation in itself constitutes a denial of the right to equal treatment. Equal treatment means the same treatment. The issues before the Court in this case are not governed by the so-called "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, and related cases. Even assuming, *arguendo,* that that doctrine retains some vitality for constitutional purposes, it does not establish the validity, under Section 3 of the Interstate Commerce Act, of the railroad's regulations. But if the Court should conclude that the issues here cannot be decided without reference to the "separate but equal" doctrine, the Government submits that the legal and factual assumptions upon which *Plessy* v. *Ferguson* was decided have been

demonstrated to be erroneous, and that the doctrine of that case should now be re-examined and overruled. The notion that separate but equal facilities satisfy constitutional and statutory prohibitions against discrimination is obsolete. The phrase "equal rights" means the same rights.

ARGUMENT

THE RAILROAD'S DINING CAR REGULATIONS, APPROVED BY THE INTERSTATE COMMERCE COMMISSION, ARE UNLAWFUL BECAUSE THEY SUBJECT PASSENGERS TO DISCRIMINATION AND INEQUALITY OF TREATMENT, SOLELY ON GROUNDS OF RACE OR COLOR

I

PASSENGERS TRAVELING ON INTERSTATE CARRIERS HAVE THE RIGHT TO RECEIVE EQUAL ACCOMMODATIONS WITHOUT BEING DISCRIMINATED AGAINST BECAUSE OF RACE OR COLOR

The dining car regulations issued by the railroad and approved by the Interstate Commerce Commission are invalid, it is submitted, on both constitutional and statutory grounds. The premise of the Government's argument is that the right of all persons to equality of accommodations while traveling on interstate carriers is a right which is specifically guaranteed by the Interstate Commerce Act and which cannot be denied by the Federal Government, or any of its agencies, without violating the Fifth Amendment to the Constitution.

The meaning and requirements of "equality" are discussed in a later section of this brief.

particularly in connection with the so-called "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, and related cases arising under the Fourteenth Amendment. In our view, "separate but equal" is as much a contradiction in terms as "black but white": facilities which are segregated by law, solely on the basis of race or color, cannot in any real sense be regarded as equal. The point we desire to stress at the outset, however, is that the ultimate criterion of legality, in assessing the validity of the regulations presented in this case, is the principle embodied in both the Interstate Commerce Act and the Constitution that all persons are entitled to *equality* of treatment, without being discriminated against because of race or color or other irrelevant factors.

Section 3 of the Interstate Commerce Act (quoted in full, *supra,* pp. 2–3) makes it unlawful for any common carrier subject to the Act "to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". As was pointed out in *Mitchell* v. *United States,* 313 U. S. 80, 95, this provision of the Act has consistently been regarded as imposing a duty upon carriers to provide equality of treatment with respect to transportation facilities and as forbidding discrimination against colored passengers because of their race; colored persons must be furnished

with accommodations equal in comforts and conveniences to those afforded white passengers traveling on the same kind of ticket. See *Edwards* v. *Nashville, C. & St. L. Ry. Co.*, 12 I. C. C. 247, 249, quoted in the *Mitchell* opinion (*ibid.*) and other authorities there cited.

Section 3 represents action by Congress in furtherance of the fundamental constitutional principle that all men, regardless of their race or color, are entitled to equal treatment before the law.[12] In *McCabe* v. *Atchison, T. & S. F. Ry.*

[12] The laws and customs of the states in which the railroad operates do not modify or qualify the scope of the prohibitions of Section 3 of the Interstate Commerce Act. This Court so held as to state law imposing requirements respecting intrastate transportation inconsistent with those of Section 3 (*Mitchell* case, *supra*, at pp. 91–92), and, *a fortiori*, the requirements of the Act do not vary with the customs of the area in which the carrier operates. This is so, not primarily because of the need for prescribing a uniform national rule (see *Morgan* v. *Virginia*, 328 U. S. 373; *Hall* v. *DeCuir*, 95 U. S. 485), but because Section 3 applies equally to every carrier subject to part I of the Act and therefore may not be given one meaning in one community and a different one in another. If the segregation enforced in the railroad's dining cars does not violate Section 3 in a state which requires segregation in intrastate transportation, it also would not violate that section when enforced by a carrier operating in a state where the laws prohibit racial separation on public carriers. See Civil Rights Law of New York, Sec. 40, and compare *Brown* v. *Southern Ry. Co.*, 269 I. C. C. 711, 722; *To Secure These Rights*, Report of the President's Committee on Civil Rights, p. 78.

As in the case of other general prohibitions applicable to interstate commerce, "The law is its own measure of right and wrong." *Standard Sanitary Manufacturing Co.* v.

Co., 235 U. S. 151, 161, this Court recognized "the constitutional right" of individuals to "substantial equality of treatment of persons traveling under like conditions." And in the comparatively recent *Mitchell* case, Mr. Chief Justice Hughes' opinion for the Court stated: "The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment". (313 U. S. 80, 94.)

These holdings in the field of transportation are merely illustrative of the basic constitutional doctrine which condemns racial discriminations having the sanction of law or the support of an agency of government. See, e. g., *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410; *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192; *Buchanan* v. *Warley*, 245 U. S. 60; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Strauder* v. *West Virginia*, 100 U. S. 303. These decisions, as well as others too familiar to require citation here, have given concrete application to the principle of constitutional law eloquently expressed by Mr. Justice Harlan: "Our

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United States, 226 U. S. 20, 49. Though Congress has power to "devise a national policy with due regard to varying interests of different regions," (Mr. Justice Frankfurter concurring in *Morgan* v. *Virginia*, 328 U. S. 373, 389), it has not, in Section 3, done so.

Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (dissent).

Racial discriminations effected by action of the Federal Government, or any agency thereof, are prohibited by the due process clause of the Fifth Amendment. To be sure, that Amendment contains no equal protection clause. But the Court has in numerous cases indicated that a federal discrimination may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment. *Hirabayashi* v. *United States,* 320 U. S. 81, 100; *Detroit Bank* v. *United States,* 317 U. S. 329, 338; *Currin* v. *Wallace,* 306 U. S. 1, 13; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585. And see *Sims* v. *Rives,* 84 F. 2d 871, 878 (C. A. D. C.), certiorari denied, 298 U. S. 682; *United States* v. *Yount,* 267 Fed. 861, 863 (W. D. Pa.). Mr. Justice Murphy's concurring opinion in *Hirabayashi* observed: "We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. [Citations]" 320 U. S. at 111. In its most recent formulation of the requirements of due process of law, the Court has described it as "the compendious expression for all those rights which the courts must enforce be-

cause they are basic to our free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27.

There can be no doubt that the right to equal treatment before the law is basic to the free, democratic way of life established and protected by the Constitution of the United States. In *Hirabayashi* v. *United States,* 320 U. S. 81, 100, Mr. Chief Justice Stone wrote for the Court: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." And in *Korematsu* v. *United States,* 323 U. S. 214, 216, the Court's approach to racial restrictions was described as follows: "* * * all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

In *Strauder* v. *West Virginia,* 100 U. S. 303, 306–307, the Court said:

> It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *

> * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

The *Strauder* case condemned the systematic exclusion of colored persons from juries. Similarly, the right to qualify as a voter in primary or general elections may not be denied because of race or color. *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *Smith* v. *Allwright,* 321 U. S. 649. The Court has held that the Constitution prohibits denial to a person, because of his race or ancestry, of the right to pursue his accustomed calling. *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410; *Truax* v. *Raich,* 239 U. S. 33; *Yick Wo* v. *Hopkins,* 118 U. S. 356. And all citizens, regardless of their color, are entitled to equality in the enjoyment of public educational facilities. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631.

Clearly, therefore, appellant has the right, both under the Constitution and the Interstate Commerce Act, to enjoy equality of accommodations as a passenger on an interstate carrier, and to be free from governmentally-enforced discrimination

against him because he is a Negro. The question that remains for consideration is whether the dining car regulations approved by the Interstate Commerce Commission deprive him of that right.[13]

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[13] Certain questions collateral to that of illegal discrimination are set at rest by the decision in *Mitchell* v. *United States*, 313 U. S. 80. Although these questions appear to be undisputed, the following brief reference to them may contribute to a more complete presentation of the case.

(1) Appellant has standing to bring this suit. The negative form of the Commission's order is "not controlling" and appellant is "an aggrieved party." It was not necessary for him to show, as a basis for his grievance against the regulations governing future dining car service, that he intended again to be a passenger on the railroad. It is sufficient that he is an American citizen free to travel and, as such, entitled to have "facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids." *Mitchell* case, pp. 92–93.

(2) The question of discrimination presented here does not call for exercise of "administrative or expert judgment" on a practical or technical problem of transportation as to which the Commission's ruling, if not arbitrary or lacking evidentiary support, might be conclusive. The functions of the Interstate Commerce Commission are obviously not such as to endow it with expertise in dealing with questions of racial discrimination. The application of the statute to the facts of this case presents a question of law as to which the courts are not bound to defer to the administrative agency's determination. *Mitchell* case, p. 97.

(3) The prohibitions of Section 3 apply to facilities for passengers, including dining car accommodations, and they bar discriminations as to such accommodations based on the race or color of the passenger. *Mitchell* case, pp. 94–95. (It may be noted that the Interstate Commerce Commission has uniformly recognized that these principles apply to dining car service but has, with equal uniformity, found no basis for

II

THE REGULATIONS ARE UNLAWFUL BECAUSE THEY PERMIT DISCRIMINATION AGAINST INDIVIDUAL PASSENGERS, WHITE AS WELL AS COLORED, SOLELY ON THE BASIS OF THE PASSENGER'S RACE OR COLOR

The court below upheld the validity of the railroad's dining car regulations upon the ground that the law is satisfied if "separate but equal" accommodations are provided for colored passengers, and that such accommodations are "equal" if they are proportionate to the average demand therefor by members of the Negro race (R. 260). We deal later with the court's "separate but equal" ruling (*infra*, pp. 23–49). In this section of the brief, we challenge the ruling that the constitutional and statutory obligation to treat all passengers alike requires equality of treatment, not as between *individuals*, but merely as between racial *groups*.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, where a state law authorizing railroads to provide accommodations for white persons without providing similar accommodations for

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an award of damages or for entry of an order requiring a change in the railroad's practice. *Stamps* v. *Chicago, Rock Island & Pacific Ry. Co.*, 253 I. C. C. 557, 560; *Brown* v. *Atlantic Coast Line R. R. Co.*, 256 I. C. C. 681, 695; *LeFlore & Crishon* v. *Gulf, Mobile & Ohio R. R. Co.*, 262 I. C. C. 403, 407; *Barnett* v. *Texas & Pacific Ry. Co.*, 263 I. C. C. 171; *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352, 362; *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I. C. C. 399, 403; *Stamps & Powell* v. *Louisville & Nashville R. R. Co.*, 269 I. C. C. 789, 795–796.)

Negroes was attacked as violating the equal protection clause of the Fourteenth Amendment, the Court said (p. 161) that "the essence of the constitutional right is that it is a personal one."[14] The Court further said (pp. 161–162):

> It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier * * * a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

Mitchell v. *United States*, 313 U. S. 80, held that the right to equal treatment conferred by Section 3 of the Interstate Commerce Act is, like the right to equal protection of the laws guaranteed by the Fourteenth Amendment, personal to the individual. The Court held (p. 97) that equality of treatment is a right "specifically safeguarded" by Section 3 and that the "comparatively little colored traffic" cannot justify denial of this "fundamental right" to even a single colored passenger. "While the supply of particular facilities may be conditioned upon

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[14] The principle thus enunciated has subsequently been vigorously reaffirmed. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350–351; *Shelley* v. *Kraemer*, 334 U. S. 1, 22. See also *Buchanan* v. *Warley*, 245 U. S. 60, 80; *Perez* v. *Lippold*, 198 P. 2d 17, 20 (Sup. Ct. Calif.).

there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused" (*ibid.*). This is because, as was held in the *McCabe* case with reference to the Fourteenth Amendment, it is the individual, "not merely a group of individuals, or a body of persons according to their numbers," who is entitled to equality (*ibid.*).

Section 3, as was noted in the *Mitchell* case (p. 97), makes it unlawful to subject "any particular person" to unreasonable discrimination. Its language thus expressly indicates that its thrust is for the protection of individuals.

The test to be applied to the railroad's regulations is, therefore, whether they provide for service which is nondiscriminatory as between individual passengers, without regard to their race or color. The regulations clearly fail to meet this test. When a Negro passenger seeks service at a time when the table reserved for members of his race is fully occupied but there are vacant seats elsewhere in the dining car, service which is available to other passengers is denied to him solely because of his race. Similarly, if a white passenger seeks service when there are vacancies only at the table reserved for colored passengers, service available to other passengers is withheld from him solely because of *his* color.

The fact that the discriminations may run equally against white as well as colored passengers does not give them sanction. The individual is entitled under the law to equality of protection, not equality of discrimination. Infringement of the rights of one individual is not condoned because the rights of another individual of a different race are similarly infringed. Concerning the rights created by the first section of the Fourteenth Amendment, this Court said in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

It is no defense that the unequal treatment permitted by the regulations may be infrequent or that it may entail delay in service rather than denial of all service. Under the carrier's practice involved in the *Mitchell* case, colored passengers, "if sufficiently diligent and forehanded," could obtain equal accommodations,[15] but the practice was nevertheless held to subject them

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[15] Although a Negro with a first-class ticket was denied an ordinary parlor car seat, he was given a drawing room compartment without extra charge provided one was available. See 313 U. S. 80, at pp. 90, 91.

to inequality and discrimination forbidden by Section 3. See 313 U. S. 80, at p. 96. Furthermore, as the dissenting opinion of Judge Soper in the court below said (R. 262), any distinction between the situation presented here and that in the *Mitchell* case "is one of degree and not of principle, for in both cases the arrangement is designed to take care of the demands of the race rather than those of the individual citizens."

III

THE REGULATIONS ARE UNLAWFUL BECAUSE THEY COMPEL PASSENGERS TO BE SEGREGATED ACCORDING TO THEIR COLOR; SUCH ENFORCED RACIAL SEGREGATION, HAVING THE SANCTION OF AN AGENCY OF GOVERNMENT, DENIES COLORED PASSENGERS THE EQUALITY OF TREATMENT WHICH IS THEIR RIGHT UNDER THE LAW

In Point II, *supra,* we have argued that the dining car regulations here involved are unlawful because they permit discrimination against an individual passenger, whether white or colored, in a situation where an available seat is denied him simply because it is reserved for a person of another race. We agree with Judge Soper, dissenting below, that the regulations as applied in such a situation clearly contravene the requirements of Section 3 of the Interstate Commerce Act. But a fundamental infirmity inheres in these regulations which goes much deeper and requires their invalidation for all purposes. The regulations, which carry the endorsement of an agency of government, compel colored passengers

to be segregated from other passengers solely because of their color. Such legally-enforced racial segregation in and of itself constitutes a discrimination and inequality of treatment prohibited by the Constitution and the Interstate Commerce Act.

A. Racial segregation under compulsion of law is not equality

Since these regulations bear the imprimatur of the Interstate Commerce Commission, they in effect lay down a rule of law that when a man travels on an interstate railroad, the color of his skin shall dictate where and with whom he is permitted to dine, no matter what his own desires may be. This case does not involve segregation by private individuals. These regulations establish a system of racial segregation enforced by and having the sanction of law. Cf. *Harmon* v. *Tyler,* 273 U. S. 668. The regulations do not merely permit voluntary segregation in the sense that they allow a passenger, if his prejudices so require, to refuse to eat at the same table or even in the same car with a passenger of another color. They go much further: a white passenger who has no prejudice against Negroes, or indeed, one who affirmatively desires the company of a colored person or persons, is forbidden by the regulations to have company of his own choice. The regulations compel such a passenger to yield to the prejudices of others. Under the regula-

tions here involved, persons traveling together, if they are of different color, cannot eat together regardless of their personal desires. Even if he so wishes, a white passenger is forbidden to sit at a colored table. In other words, the regulations do not merely carry out the prejudices of some members of the community; they compel everybody else to abide by such prejudices.

We do not argue that individuals do not, or should not, have a legal privilege to exercise a personal preference against eating at the same table, or in the same section of the dining car, with Negroes. If the regulations are declared unlawful, that individual privilege would remain unimpaired. A passenger who prefers to forego or postpone a meal rather than take it while a person of another color is being served in the same car would be free to do so. A passenger who objects to dining at the same table with a person of another color would be free to decline a seat proffered at a table where such a person is being served. The decisive point here, however, is that it is one thing to permit an individual to act on his personal prejudices; it is something entirely different for the law to force such prejudices upon everyone else.

In *Plessy* v. *Ferguson,* 163 U. S. 537, the first case holding that segregation does not violate the equal protection clause of the Fourteenth Amendment, the Court expressed the view that the

alternative to segregation is "an enforced commingling" of the white and colored races. This observation, as we shall argue in a later section of this brief, was irrelevant to the constitutional issue before the Court. In determining the validity of legislation alleged to involve an invidious racial discrimination, the inquiry is not whether the enactment will eradicate racial prejudice or solve problems of racial antagonism; the issue is simply whether it enforces, supports, or otherwise contributes to the denial of a constitutionally-protected right. But, in any event, the Court's dictum rests on an obviously false premise. If "commingling" between white and colored persons comes about as a consequence of nullifying segregation ordinances or regulations, such commingling is not "enforced" by the law. It is the result of voluntary conduct of the individuals concerned, acting not under the coercion of the law but in response to their own desires.

The alternative to compulsory segregation, therefore, is *not* an "enforced" commingling of the races. With non-segregated service, the individual passenger is free to avoid any "commingling" which he considers objectionable. Some individuals may object to eating in the same car with a Negro. Others will "draw the line" at eating at the same table with a Negro. Still others will feel that it makes no difference what the color of their fellow-passengers may be.

Whatever the individual's personal preferences or code of social behavior, no departure from it is "enforced" by anything except his own will.

It must be remembered, of course, that one who goes to a public place or rides a public conveyance necessarily surrenders some freedom of choice as to those with whom he will mingle. What was said in *Ferguson* v. *Gies*, 82 Mich. 358, 367–368, deserves repetition:

> The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.

B. Segregation imports, and is designed to import, the inferiority of the Negro race

Segregation of Negroes, as practiced in this country, is universally understood as imposing on them a badge of inferiority.[16] It "brands the

[16] Myrdal, *An American Dilemma*, vol. I, pp. 615, 640; Johnson, *Patterns of Negro Segregation*, p. 3; Fraenkel, *Our Civil Liberties*, p. 201; Dollard, *Caste and Class in a Southern Town*, pp. 349–351; Note, 56 Yale L. J. 1059, 1060; Note, 49 Columbia L. Rev. 629, 634; Note, 39 Columbia L. Rev. 986, 1003.

Negro with the mark of inferiority and asserts that he is not fit to associate with white people".[17] Forbidding this group of American citizens "to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."[18]

More than fifty years of subsequent history confirm and give new emphasis to the views expressed by Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, 562. He declared that the "arbitrary separation" of members of the Negro race when traveling in a public conveyance "is a badge of servitude." He further said (p. 560):

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

That the type of segregation imposed by the railroad's regulations is humiliating to those subjected to it is so obvious as scarcely to need documentation.' Myrdal has noted that "the Jim

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[17] *To Secure These Rights*, Report of the President's Committee on Civil Rights, 79.

[18] *Id.*, 82.

Crow car is resented more bitterly among Negroes than most other forms of segregation." [19] Johnson has described the trend among Negroes towards travel by automobile which "is considered worth the extra cost" because of "the emotional satisfaction derived from escaping humiliating treatment." [20] Dollard has indicated that the Negro understands this type of segregation as marking him off as inferior, "of not being worthy to participate fully in American social life." [21] See also appellant's brief in the instant case, Appendix, pp. 94–106.

One who is compelled to live in a ghetto, because of his color or creed, does not enjoy "equality", no matter how luxurious his abode. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1, and *Hurd* v. *Hodge*, 334 U. S. 24. The same principle applies here. A colored passenger who is set apart in a corner by himself is in no real sense being treated as an equal. The curtain or partition which fences Negroes off from all other diners exposes, naked and unadorned, the caste system which segregation manifests and fosters. A Negro can obtain service only by accepting or appearing to accept, under the very eyes of his fellow passengers, white and colored, the caste status which the

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[19] Myrdal, *An American Dilemma*, vol. 1, p. 635.

[20] Johnson, *Patterns of Negro Segregation*, 270.

[21] Dollard, *Caste and Class in a Southern Town*, 350. See also Stouffer, et al., *Studies in Social Psychology in World War II, The American Soldier*, vol. 1, p. 561.

segregation signifies and is intended to signify. The effect of the railroad's regulations and practice emphasizes that their single purpose is to foster maintenance of a caste system. One side of the segregated table adjoins the side of the car. Of the other three sides, the curtain shuts off only one. The table is exposed to the view of those passing in the aisle, to those sitting at the table immediately across the aisle,[22] and to some extent to those sitting at other tables. One sociologist has commented that the curtain is "exposed only enough to indicate the intent to segregate."[23] Another commentator has described this type of separation as "merely a symbolic assertion of social superiority, a 'ceremonial' separation."[24]

Concerning the five-foot high wooden partition which the railroad proposed to erect as a substitute for the curtain, the remarks of Judge Soper in

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[22] When the change to a wooden partition is made, the space across the aisle will be occupied by the dining car steward rather than by white passengers (*supra*, p. 8).

[23] Johnson, *Patterns of Negro Segregation*, p. 321.

[24] McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 Calif. L. Rev. 5, 27 at n. 94.

The Railroad's dining car steward testified that the curtain hangs on hooks on a rod and if it is not properly hooked up and gets only half drawn he "has done the technical thing" and will not take the trouble to draw the curtain fully (R. 160).

the course of the argument in the court below are pertinent and illuminating (R. 38):

> Why do you put up these absurd partitions? They don't conceal anything; they simply call attention of the white passengers to the fact that the colored person is dining there. It seems to me that it is just unnecessary humiliation.

Counsel for the railroad answered the question as to the reason for the partition by saying: "Simply to separate the two races." (R. 39.) He added that "it satisfies the white people, and it certainly is much *less offensive* to the negroes" (*ibid.*, italics supplied).

Section 3 of the Interstate Commerce Act forbids "undue or unreasonable prejudice or disadvantage in any respect whatsoever." The prohibition applies to "any discriminatory action or practice of interstate carriers" which Congress had "authority to reach." *Mitchell* case, p. 94. Under the broad and inclusive language of the section, the "substantial equality of treatment" which it requires (*id.*, p. 97) is plainly not confined to the physical elements of dining car service, such as food, tableware, etc. Manifestly, colored passengers would be discriminated against if the railroad's rules required its waiters to say, when serving them: "Don't think, because we have to serve you, that we believe you're as good as whites." The wrong would be compounded if a loud-speaking device carried these words to

every diner in the car. But in substance, although the form may have been less offensive, these were the conditions under which the railroad furnished dining car service to colored passengers.

If ex-convicts were given dining car service only at a table barred off from others, but open to view, and carrying a card, "Reserved for Ex-Convicts," we have no doubt that the courts would be quick to recognize the gross inequality of treatment. To make this analogy fit the facts of the present case, the traveling public would have to be informed that not only were ex-convicts thus segregated but also all descendants of ex-convicts, to the third or fourth generation.[25]

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[25] For the varying statutory and judicial definitions of "Negro" or "colored," see *Morgan* v. *Virginia*, 328 U. S. 373, 382–383; Mangum, *The Legal Status of the Negro*, ch. 1; Note, 34 Cornell Law Quar. 246, 247–251; Note, 58 Yale L. J. 472, 480–481.

"Without any doubt there is also in the white man's concept of the Negro 'race' an irrational element which cannot be grasped in terms of either biological or cultural differences. It is like the concept 'unclean' in primitive religion. It is invoked by the metaphor 'blood' when describing ancestry. * * * The one who has got the smallest drop of 'Negro blood' is as one who is smitten by a hideous disease. It does not help if he is good and honest, educated and intelligent, a good worker, an excellent citizen and an agreeable fellow. Inside him are hidden some unknown and dangerous potentialities, something which will sooner or later crop up. This totally irrational, actually magical, belief is implied in the system of specific taboos * * *." Myrdal, *An American Dilemma*, vol. 1, p. 100.

The colored passenger, paying the same price for his meal as other passengers, does not receive the same thing in return. True, he receives the same food, but the condition which is attached to receiving it is that he submit to having his mind bombarded with the message that he and all members of his race are classified as inferior, as constituting a lower social caste.[26] This message of humiliation comes, not as a single voice, but with all the reverberations of the entire pattern of segregation and discrimination of which it is a part. And that is not a matter of small consequence. The segregation which isolates the Negro from others in the community and marks him as ostracized, a kind of "untouchable," gravely affects his personality and causes serious psychological difficulties and disturbances (*infra*, pp. 50–54).

The Negro is plagued by the concept—evidence of which he constantly sees around him in his daily life—that he and his people are regarded as inferior.[27] It remains one of the most devas-

[26] "The fact that accommodations are identical in physical comfort does not make them really equal, since there is a social stigma attached to the position of the minority. To say that, since neither group can use the facilities reserved for the other, they are in an equal position is unrealistic; members of the minority know only too well the reasons for the segregation and are humiliated by it." Note, 39 Col. L. Rev. 986, 1003.

[27] "The word 'segregation' itself has come to represent to Negroes a crucial symbol of white attitudes of superiority." Stouffer, et al., *Studies in Social Psychology in World War II, The American Soldier*, vol. I, p. 566.

tating frustrations of his life. Under its impact, he does not dare to be a person of his own distinct uniqueness and individuality.[28] The persistent effort of Negro leaders to develop attitudes aimed at maintaining the human dignity of the Negro tells its own story.[29]

It is bad enough for the Negro to have to endure the insults of individuals who look upon him as inferior. It is far worse to have to submit to a formalized or institutionalized enforcement of this concept, particularly when, as in this case, it carries the sanction of an agency of government and thus appears to have the seal of approval of the community at large. Such enforced racial segregation in and of itself constitutes inequality.[30] In this situation, the phrase

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[28] Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do To The Individual And To His Relationships With Other People?*, 29 Mental Hygiene 189, 190–191

[29] "The pledge to myself which I have endeavored to keep through the greater part of my life is:

> "I will not allow one prejudiced person or one million or one hundred million to blight my life. I will not let prejudice or any of its attendant humiliations and injustices bear me down to spiritual defeat. My inner life is mine, and I shall defend and maintain its integrity against all the powers of hell."

James Weldon Johnson, *Negro Americans, What Now?*, p. 103. See also Washington, *The Future of the American Negro*, p. 26.

[30] "No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living *creates inequality* by imposing caste status on the minority group." [Italics supplied.] *To Secure These*

"separate but equal" is a plain contradiction in terms.

C. The "separate but equal" doctrine does not control the issues before the Court in this case, but that doctrine, if it be deemed applicable here, should be reexamined and discarded

The segregated basis on which the railroad furnished dining car service to colored passengers clearly constituted inequality of treatment condemned by Section 3 of the Interstate Commerce Act, unless it is to be interpreted as requiring only the trappings, not the substance, of equality. Such a narrow construction could not easily be squared with the "sweeping prohibitions" of the Act. *Mitchell* case, 313 U. S. at p. 94.[31] The court

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Rights, Report of the President's Committee on Civil Rights, 82.

"The Court has never faced the reality that segregation necessarily implies inequality, for equals do not hesitate to mingle with each other in public places. Any traveler in lands where segregation is practiced, be it the South where the victim is the Negro, or Nazi Germany where it is the Jew, knows that segregation is a badge of one race's claim to superiority over the other." Fraenkel, *Our Civil Liberties*, p. 201.

[31] The prohibition of "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" is certainly as broad as the prohibition of denial of "full and equal accommodations," the phrase generally used in state statutes prohibiting discrimination. This prohibition has been uniformly held to apply to segregation. See, e. g., *Jones* v. *Kehrlein*, 49 Cal. App. 646; *Ferguson* v. *Gies*, 82 Mich. 358, 363; *Joyner* v. *Moore-Wiggins Co.*, 136 N. Y. S. 578, affirmed without opinion, 211 N. Y. 522; *Anderson* v. *Pantages Theatre Co.*, 114 Wash. 24. See also Mangum, *The Legal Status of the Negro*, pp. 34–38; Note, 39 Col. L. Rev. 986, 1003. Cf. *Railroad Co.* v. *Brown*, 17 Wall. 445, 451–453.

below has held, however, that the enforced segregation of Negro passengers in railroad dining cars is not a denial of their right to equal accommodations, and in support of this holding has relied on several decisions of this Court regarded as establishing the rule that "separate but equal" facilities satisfy the requirements of the law. It is submitted, however, that (1) the authorities relied on do not control the issues presented by this case, and that (2) if the so-called "separate but equal" doctrine be deemed applicable here, it should be reexamined and overruled.

(1) *Hall* v. *DeCuir,* 95 U. S. 485, the earliest of the cases cited in support of the ruling below, held only that a state enactment infringes upon the federal commerce power when it regulates an interstate carrier with respect to separation or non-separation of white and colored passengers. This ruling obviously has no application to the issues here presented. Cf. *Morgan* v. *Virginia,* 328 U. S. 373. Similarly, *Chiles* v. *Chesapeake & Ohio Rwy. Co.,* 218 U. S. 71, merely held that when an interstate carrier provides separate cars or compartments for the exclusive use of white passengers and others for the exclusive use of colored passengers, it does not exceed the limits of its authority to establish reasonable regulations governing the transportation service which it performs. This was implicitly held in the *De Cuir* case, and the *Chiles* case was regarded as con-

trolled by the earlier decision.[32] In the *Chiles* case the plaintiff did not at any stage of the proceeding rely upon any provision of the Interstate Commerce Act[33] and the briefs filed in this Court did not even mention Section 3 of the Act. The Court, in assuming that Congress had taken no action respecting segregation in interstate travel, referred to what was said and held on this point in the *De Cuir* case. See pp. 75–77. Since the Court's assumption as to nonaction by Congress was based on a case decided ten years before passage of the Interstate Commerce Act, and since it was made without giving any consideration to the anti-discrimination provisions of Section 3 of that Act, the decision cannot possibly be deemed a construction of the meaning or application of Section 3.

In *Mitchell v. United States*, 313 U. S. 80, the carrier had refused to give to the plaintiff, because of his race, any Pullman car accommodations.

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[32] Of the portion of the opinion in the *Chiles* case setting forth the grounds of decision (pp. 75–78), over two-thirds is devoted to a discussion of the *De Cuir* case and its application.

[33] The plaintiff had not filed a complaint with the Interstate Commerce Commission and therefore was probably barred from relying upon any claim of violation of the Interstate Commerce Act. If such a claim "necessarily involves a question of 'reasonableness,'" the Commission has "primary jurisdiction" and there can be no recovery in the absence of a ruling by the Commission on the question of violation. *United States v. Interstate Commerce Commission*, 337 U. S. 426, 437.

The case therefore presented, as this Court said (p. 94), "not a question of segregation but one of equality of treatment." To be sure, the Court's opinion appeared to agree with the view that the carrier's subsequent practice of furnishing a compartment to a colored passenger for the price of a Pullman seat "avoids inequality." See p. 96. This aspect of the decision is not, however, presently apposite. The type of segregation here involved is far more serious. When colored passengers are furnished dining car service only at a table partially screened off as a symbol and token of their separate and inferior status, the segregation is open, explicit, and humiliating.

Finally, reliance is placed most heavily on *Plessy* v. *Ferguson,* 163 U. S. 537, which ruled that state-enforced separation of white and colored persons under a statute requiring "equal" accommodations does not necessarily infringe the command of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws. We submit that, even assuming *arguendo* that the "separate but equal" doctrine retains some vitality for constitutional purposes, it does not establish the validity, under the Interstate Commerce Act, of the segregation enforced in the railroad's dining cars.

In the first place, the language of the statute provides a possible basis for distinction. The

prohibition of Section 3, that no carrier shall subject any person to "*any* undue or unreasonable prejudice or disadvantage *in any respect whatsoever*", is both precise and inclusive. This may conceivably be construed differently from the language of the "equal protection of the laws" clause of the Fourteenth Amendment, which has "a generality and adaptability * * * found to be desirable in constitutional provisions."[34]

In the second place, the statute and the constitutional provision differ in background and, to some extent, in purpose. In the *Plessy* case the Court gave as grounds for its ruling that the equal protection clause covers only "civil and political" rights and that enforced separation of the white and colored races does not infringe such rights. See 163 U. S. 537, at pp. 544, 551. As we have stated, we believe this holding to be erroneous. But, even if it be accepted, the same conclusion does not necessarily follow where the question is whether giving service to the members of a race under conditions which publicly stigmatize them as ostracized and inferior, when no such conditions attach to the service given others, is in conflict with the explicit statutory provision that no interstate carrier shall, in the course of the service which it renders, subject any person to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

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[34] See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360.

In the third place, the present case comes within an exception to the "separate but equal" doctrine stated or plainly indicated in the *Plessy* opinion. The Court there said (p. 544) that laws requiring the separation of the white and colored races "do not *necessarily* imply the inferiority of either race to the other" (italics supplied). In other words, if the separation required did imply the inferiority of one race, the accommodations would be "separate" but they would not be "equal." While the *Plessy* case held that enforced separation is not in and of itself inequality, it did not hold that, as a matter of law, similar but separate physical accommodations are always equal. And if the question is one of fact, the facts of the present case establish beyond all doubt that the segregation which is enforced here is the antithesis of equality (*supra*, pp. 28–34).

(2) If this Court should conclude that the issues presented by this case cannot be considered without reference to the "separate but equal" doctrine, the Government respectfully urges that, in the half-century which has elapsed since it was first promulgated, the legal and factual assumptions upon which that doctrine rests have been undermined and refuted. The "separate but equal" doctrine should now be overruled and discarded.

The decision in the *Plessy* case appears to rest on two major premises. One is that laws requiring separation of the white and colored races

do not imply the inferiority of the colored race. The other is that segregation infringes only "social" rights and that these rights, as distinct from "civil" or "political" rights, are not within the ambit of the equal protection clause of the Fourteenth Amendment.

It is a question of fact what the community at large understands to be the meaning of singling out the members of the colored race for separation from all other citizens, whether it is in purchasing a bus ticket at the same ticket window, riding on the same street car or railroad coach, or going to the same restaurant, theatre or school. In the *Plessy* case the Court concluded that this minority race is not stigmatized as inferior, as constituting a lower social caste, when law decrees that it shall ride apart, eat apart, or stand in line for tickets apart. We submit that the Court's *a priori* conclusion cannot stand today in the face of a wealth of evidence flatly contradicting it.[35]

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[35] In addition to the materials and authorities cited elsewhere in this brief, see Myrdal, *An American Dilemma*, 100, 628; Dollard, *Caste and Class in a Southern Town*, 62–63, 266; Heinrich, *The Psychology of a Suppressed People*, 57–61; Sutherland, *Color, Class, and Personality*, 42–59; Johnson, *Patterns of Negro Segregation*, 270; Bond, *Education of the Negro and the American Social Order*, 384; Moton, *What the Negro Thinks*, 12–13, 99; Bunche, *Education in Black and White*, 5 Journal of Negro Education 351; *To Secure These Rights*, *supra*, 79, 82; Fraenkel, *Our Civil Liberties*, 201.

See also McGovney, *Racial Residential Segregation by*

We likewise believe that there was error in the second premise of the "separate but equal" doctrine enunciated in the *Plessy* case, namely, that enforced separation of the races affects only "social" rights not within the purview of the Fourteenth Amendment. The Amendment strikes at inequality without qualification. Certainly its language furnishes no basis for the distinction which the Court drew between "social" rights

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State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional, 33 Calif. L. Rev. 5, 27, note 94; Note, 39 Columbia L. Rev. 986, 1003; Note, 56 Yale L. J. 1059, 1060; Note, 49 Columbia L. Rev. 629, 634.

In *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 231, the Court said: "In this state, where a reasonable regulation of the conduct of the races has led to the *establishment of separate schools and separate coaches*, and where conditions properly have erected insurmountable barriers between the races when viewed from a social and a personal standpoint, and where the habits, the disposition, and characteristics of the race *denominate the colored race as inferior* to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored." [Italics supplied.]

In *Wolfe* v. *Georgia Railway & Electric Co.*, 2 Ga. App. 499, 505, the court said: "It is a matter of common knowledge, that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality."

For other cases holding that applying the word "Negro" or "colored person" to a white man gives rise to an action for defamation see *Flood* v. *News & Courier Co.*, 71 S. C. 112; *Stultz* v. *Cousins*, 242 Fed. 794 (C. A. 6). See also *Louisville & Nashville R. R. Co.* v. *Ritchel*, 148 Ky. 701, 706; *Missouri, K. & T. Ry. Co.* v. *Ball*, 25 Tex. Civ. App. 500, 503; *Chicago R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 60-61.

and those which are "civil" or "political." Furthermore, the distinction drawn is, at best, nebulous and largely a matter of emphasis. "In reality it is not possible to isolate a sphere of life and call it 'social.' There is, in fact, a 'social' angle to all relations."[36]

It is one thing to define social equality in terms of integration into white social organizations; it is another to define as "social" the right to equality in the use and enjoyment of public facilities.[37] Travel is for business as well as for pleasure. This Court has held that the Fourteenth Amendment requires "substantial equality of treatment" as to the facilities afforded to those who travel by railroad. *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161.

In the *Plessy* case the Court also said (p. 551) that legislation is "powerless to eradicate" racial prejudice. This observation, even if true, was irrelevant to the constitutional issue before the Court. It might properly have been made before a legislative body considering the merits of a bill to penalize conduct manifesting racial prejudice. But the Court was not called upon to make a judgment of policy as to whether racial prejudice can be eradicated by legislation; the only question was whether a particular statute created, en-

[36] Myrdal, *An American Dilemma*, vol. 1, p. 642.
[37] Drake & Cayton, *Black Metropolis*, 121.

forced, or supported the denial of a constitutionally protected right. Statutes and ordinances may not in themselves remove racial antagonisms, but it is clear that they cannot constitutionally magnify such antagonisms by giving the sanction of law to what would otherwise be a private, individual act of discrimination. That is the basic vice of the Commission's order in this case.

In any event, the Court's observation is, at best, a half-truth. Although legislation cannot "eradicate" racial prejudice, experience has shown that it can create conditions favorable to the gradual disappearance of racial prejudice; or it can, on the other hand, strengthen and enhance it. Civil-rights and antidiscrimination statutes have been shown to have the former effect, and so-called Jim Crow laws the latter. A Commissioner of the New York State Commission Against Discrimination has recently written:

> Critics of fair-employment laws used to claim that long-established habits of discrimination could not be changed by legislation. Their argument has been unmistakably answered today. Nearly four years' experience in New York—and similar experience in New Jersey, Massachusetts, Connecticut, Washington, Oregon, New Mexico and Rhode Island, all of which have passed anti-discrimination legislation modeled after the New York law—indicates

conclusively that wise legislation creates a climate of opinion in which discrimination tends to disappear.[38]

On the other side of the picture, "Jim Crow" laws, which govern important segments of everyday living, not only indoctrinate both white and colored races with the caste conception, but they solidify the segregation existing outside these laws and give it respectability and institutional fixity.[39] As the Supreme Court of California has pointedly said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension."[40] In fields which "Jim Crow" laws do not cover there has been "a slow trend toward a breakdown of segregation"; within the fields of their operation the laws "keep the pattern rigid."[41]

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[38] Simon, *Causes and Cure of Discrimination*, New York Times, May 29, 1949, section 6, p. 10, at p. 35. "Can this technique of eliminating discrimination by rooting out the fears that cause it be applied successfully on a large scale? Our New York experience insists that the answer is an unequivocal 'Yes.' * * * we have changed the entire pattern of employment of the most populous state in the union in less than four years." (*Id.*, p. 36.) See *1948 Report of Progress*, New York State Commission Against Discrimination, pp. 11–12.

[39] Myrdal, *An American Dilemma*, vol. 1, pp. 579–580. See also Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 Col. L. 201, 204–205.

[40] *Perez* v. *Sharp*, 32 Calif. 2d 711, 725.

[41] Myrdal, *An American Dilemma*, vol. 1, p. 635.

In the South, segregation in privately operated public services "is often less rigid than in those operated by government" (*id.*, p. 634).

We submit, moreover, that the Fourteenth Amendment, considered in the light of its history and purposes, furnishes no support for the "separate but equal" doctrine. The Amendment was primarily designed to establish Negroes as citizens and to protect them in the full enjoyment of rights concomitant to such status. This Court has said that "the chief inducement to the passage of the Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States." *Buchanan* v. *Warley,* 245 U. S. 60, 76. It is "to be construed liberally, to carry out the purposes of its framers," and the effect of its prohibitions is to declare that "the law in the States shall be the same for the black as for the white; * * * and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Strauder* v. *West Virginia,* 100 U. S. 303, 307. It was designed to forestall state legislation aimed at maintaining the subordinate status of those newly emancipated. When the Amendment was adopted, "it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be en-

acted or enforced to perpetuate the distinctions that had before existed." *Id.*, p. 306. See also the *Slaughter-House Cases*, 16 Wall. 36, 70–72, 81.

Segregation does not appear to have been specifically discussed in the debates on the Amendment itself. The apparent reasons for this were that the first section of the Fourteenth Amendment was designed to secure the analogous provisions of Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, by incorporating them into the Constitution,[42] and that the question of segregation had been fully considered during the debates preceding passage of the Civil Rights Act of 1866. The opponents of the bill had repeatedly argued that it would require the abolition of separate schools.[43] While a few advocates of the measure disputed this,[44] it is far from clear that a majority of the bill's supporters shared this view. Contemporaneous press comment reflects the general understanding that the bill would prohibit segregation.[45]

The debates preceding enactment of the Civil Rights Act of 1875, 18 Stat. 335, show even more clearly that the Amendment was understood to outlaw state-enforced segregation. The bill in

[42] Flack, *Adoption of the Fourteenth Amendment*, 20, 81, 94–95.

[43] Cong. Globe, 39th Cong., 1st Sess., 499, 500, 1268.

[44] *Id.*, 1117–1118, 1294.

[45] Flack, *supra*, at 41, 44–45, 53–54.

its original form provided that all persons, without distinction as to race or color, should be entitled to "equal and impartial" enjoyment of any accommodation furnished by common carriers, public schools, innkeepers and the like.[46] Both supporters and opponents of the measure construed it as invalidating racial segregation.[47] Proposed amendments to permit local communities to provide equal but separate educational facilities were defeated in both branches of Congress.[48] While express reference to public schools was finally eliminated,[49] its elimination was not because of doubt of the power of Congress under the Fourteenth Amendment, since the "full and equal" requirement was retained as to other accommodations, advantages and facilities.

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[46] Cong. Globe, 42d Cong., 2d Sess., 244 (1871). The bill was first introduced by Senator Sumner as an amendment to another measure on December 20, 1871. Each succeeding session it was reintroduced with immaterial variations until its passage in 1875. The change from "equal and impartial" to "full and equal" in the Act's final form appears to be without significance.

[47] Cong. Globe, 42d Cong., 2d Sess., 763, 843–845, 3258–3262 (1872); 2 Cong. Rec. 4116, 4143–4145, 4167–4169, 4171–4174 (1874). See also Flack, *supra*, 250–276.

The Civil Rights Act of 1875 was eventually declared unconstitutional upon the ground that it operated directly upon individuals, whereas the prohibitions of the Fourteenth Amendment run only against state action. *Civil Rights Cases*, 109 U. S. 3.

[48] Cong. Globe, 42d Cong., 2d Sess., 3258–3262 (1872); 2 Cong. Rec. 4167 (1864); 3 Cong. Rec. 1010 (1875).

[49] 3 Cong. Rec. 1010.

Since Section 5 of the Fourteenth Amendment authorizes Congress to enforce only the provisions of the Amendment, the passage of prohibitory legislation embracing racial segregation clearly shows that a majority of both branches of Congress thought that segregation came within the prohibitions of the Amendment.

D. The harm to the public interest which has resulted from enforced racial segregation argues against its extension to the field of interstate transportation

The effects of the segregation to which Negroes are subjected are not confined to those who are colored. They extend also to those who are white, and they bear vitally upon the interests of the Nation as a whole. We submit that the harmful effects to the public interest which have resulted from racial segregation furnish persuasive grounds for rejecting its extension to the field of interstate transportation. In addition, the materials referred to in this section of the brief conclusively refute the notion that facilities segregated on a racial basis can in any circumstances be regarded as equal.

1. Effect on Negroes

Segregation is a dominant factor in every aspect of the Negro's life. It limits his physical movements and economic opportunities, and adversely affects his personality and social development. It is much more than jim-crowism in ve-

hicles and public places. It is an ostracism symbolizing inferiority which colors his thoughts and action at almost every moment.[50]

Professional opinion is almost unanimous that segregation has detrimental psychological effects on those segregated. A questionnaire addressed to 849 representative social scientists was answered by 61% of those to whom it was sent.[51] Of those replying, 90.4% believed that enforced segregation has "detrimental psychological effects" on those segregated if "equal facilities" are provided, 2.3% expressed the opposite opinion, and 7.4% did not answer the question or ex-

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[50] "Every time I think about it, I feel like somebody's poking a red-hot iron down my throat. Look! we live here and they live there. We black and they white. They got things and we ain't. They do things and we can't. It's just like living in jail. Half the time I feel like I'm on the outside of the world peeping in through a knothole in the fence." Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do to the Individual and to His Relationships with Other People?* 29 Mental Hygiene 189, 193, quoting from *Native Son* by Richard Wright.

[51] Deutscher & Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology 259, 261, 262. The questionnaire was sent to all members of the American Ethnological Society, to all psychologists who were members of the Division of Social Psychology and Personality of the American Psychological Association, to all sociologists who were members of the American Sociological Society and listed race relations or social psychology as a major or dominant interest, and to sociologists who had published research on race relations during the period 1937–1947 (*id.*, 260). Nearly two-thirds of those who replied gave personal professional experience as a basis for the opinion expressed (*id.*, 271).

pressed no opinion.[52] Those who elaborated their position with comments (55% of those replying) stressed that segregation induced feelings of inferiority, insecurity, frustration, and persecution, and that it developed, on the one hand, submissiveness, martyrdom, withdrawal tendencies, and fantasy, and on the other hand, aggression.[53]

The resentment and hostility provoked by segregation find various means of psychological "accommodation," various forms of release.[54] Medi-

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[52] *Id.*, 261, 266.

[53] *Id.*, 272–277.

[54] "A constant stream of stimuli bombarding the personality with feelings of humiliation, must inevitably produce among others a state of continuously existing hatred, which unable to discharge itself directly on the offending stimulus, remains floating, to be released in a greatly exaggerated form on the first suitable object." Prudhomme, *The Problem of Suicide in the American Negro*, 25 Psychoanalytic Review 187, 200;

"Accommodation involves the renunciation of protest or aggression against undesirable conditions of life and the organization of the character so that protest does not appear, but acceptance does. It may come to pass in the end that the unwelcome force is idealized, that one identifies with it and takes it into the personality; it sometimes even happens that what is at first resented and feared is finally loved. In this case a unique alteration of the character occurs in the direction of masochism." Dollard, *Caste and Class in a Southern Town*, 255.

"Even though their personalities seem well accommodated to the caste system, it should not be thought that the Negroes are too stupid to realize the nature of the situation. They understand it quite well, in fact much better than do members of the white caste who naturally wish to disguise and extenuate it out of loyalty to our democratic theory which

ocrity is accepted as a standard because of the absence of adequate social rewards or acceptance.[55] Energy and emotion which might be constructively used are lost in the process of adjustment to the "Jim Crow" concept of the Negro's charac-

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does not countenance caste and class gains. * * * We may believe, then, that Negroes will perceive the caste and class distinctions as a chronic frustration situation. In such a situation we should expect aggression from them. What, in fact, do they do?

"There seem to be five possibilities of action on the part of the Negroes in the face of these gains [since slavery]. They can:

"(1) Become overtly aggressive against the white caste: this they have done, though infrequently and unsuccessfully in the past.

"(2) Suppress their aggression in the face of the gains and supplant it with passive accommodative attitudes. This was the slavery solution and it still exists under the caste system.

"(3) Turn aggression from the white caste to individuals within their own group. This has been done to some extent and is a feature of present-day Negro life.

"(4) Give up the competition for white-caste values and accept other forms of gratification than those secured by the whites. This the lower-class Negroes have done.

"(5) Compete for the values of white society, raise their class position within the Negro caste and manage aggression partly by expressing dominance within their own group and partly by sheer suppression of the impulse as individuals. This is the solution characteristic of the Negro middle class." Dollard, *supra*, 252–253.

[55] "The middle-class Negro tries to maintain allegiance to the dominant American standards and then experiences the bitter fact that this allegiance is not rewarded as it is in the white caste; instead he is ignominiously lumped with persons in his own class whose behavior standards are inferior to his own." Dollard, *supra*, 424.

"In order for any individual to mature, that is, to be will-

teristics and his inferior status in society.[56] Psychosomatic disease is induced by the tensions en-

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ing to assume responsibility in work and in personal relations; he must feel that there is some hope of attaining some of the satisfactions of maturity. * * * White society gives him [the Negro] little share in any of the mature gratifications of creative work, education, and citizenship. It would not be remarkable if, deprived of all mature gratifications, he lost zest for responsible action." McLean, *Group Tension*, 2 Journal of American Medical Women's Association 479, 482.

[56] "One of the most devastating frustrations that plague the Negro is the majority concept that the Negro people are inferior; that always they remain infantile or childlike; that their smiling, happy faces are but conclusive evidence that they are not capable of seriousness of purpose or of sustained intellectual participation. * * * All of us know the terrific impact that constant repetition has upon the psyche. * * * The Negro is born into a culture that stubbornly refuses to accept him as an equal. Custom and tradition force the majority concept of his inferiority into his consciousness and keep it there.

"Let us next consider the frustrations involved in the process of never being allowed to be one's self, never daring to be a person in one's own distinct uniqueness and individuality. * * * Negroes when in contact, casual or prolonged, with other Negroes, invariably turn the conversation to a discussion of race, its implications and methods of solving the problem, either through individual or through collective action. When Negroes are in the company of white persons, the conscious awkwardness, the studied carefulness, the restraint, the unconscious tones and undertones—all these are a constant reminder to the Negro that he is a Negro and that his status is that of a dispossessed minority. Imagine, if you will, the tremendous emotional energy expended in the process of never being able to be unaware of one's self. Imagine, if you can, the tragedy of the diffused and dissipated energy that is lost in the process of having

gendered by segregation and other forms of racial discrimination.[57]

The extensive studies made of Negro troops during the recent war furnished striking example of how racism, of which segregation is the sharpest manifestation, handicaps the Negro. The most important single factor affecting integration of the Negro into Army life was that he had to carry the burden of race prejudice in addition to

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constantly to think of one's designated and specifically limiting minority role." Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do to the Individual and to His Relationships with Other People?*, 29 Mental Hygiene 189, 190–191.

[57] "The high incidence of hypertension among southern Negroes is probably one indication of an unconscious attempt at mastery of the hostility which must be controlled. The chronic rage of these individuals produces the hypertension which initially is fluctuating in character. Eventually the pathological changes resulting from this overload on the cardiovascular renal system lead to a consistently high blood pressure. All available evidence from clinicians indicates that functional (that is, psychosomatic) disease is markedly on the increase in the Negro." McLean, *Psychodynamic Factors in Racial Relations*, The Annals of the American Academy of Political and Social Science (March 1946), 159, 161.

"The psychology of the Negro developed in the repressive environment in which he lives might be described as the psychology of the sick * * * It is impossible to estimate what are the pathological results of the above outlook on life. It must certainly mean a reduction in that energy that characterizes healthy organisms." Frazier, *Psychological Factors in Negro Health*, Journal of Social Forces, vol. 3, p. 488.

all of the other problems faced by the white soldier.[58]

For a general discussion of the effects of the caste system, which segregation supports and exemplifies, on Negro personality and behavior, see Myrdal, *An American Dilemma,* vol. 2, pp. 757–767.

2. Effect on Whites

Segregation also detrimentally affects the dominant white group.[59] "Segregation and discrimination have had material and moral effect on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers." Myrdal, *An American Dilemma,* vol. I, pp. 643–644. The white person must adjust himself, consciously or unconsciously, to the hypocrisy of a double standard violating the American creed which he professes to follow. Feelings of guilt are generated and moral values weakened; the basic realities of the racial problem are diverted into the mechanism of segregation:

> Those who segregate others soon become frightened, insecure people forced to ac-

[58] *Studies in Social Psychology in World War II,* vol. I, chap. 10. See particularly pp. 502, 504, 507.

[59] Deutscher & Chein, *supra,* 26 Journal of Psychology 261, 267.

> cept and invent prejudice to justify their actions. They become hyprocrites who either close their eyes to stark reality or invent slogans to hide fundamental issues. The master classes, no less than the subjected, become victims of the system.[60]

Segregation and practices allied to it promote the master-race psychology, thus sowing the seeds for oppressive individual and collective action.

3. Effect on the Nation

Segregation is part of a vicious cycle. It prevents groups from knowing each other. This lack of knowledge engenders distrust and antagonism. They in turn stimulate the demand for sharp cleavage between races and maintenance of a system of segregation. Thus groups within the Nation are kept asunder.[61]

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[60] Weaver, *The Negro Ghetto*, 270.

[61] From these natural causes the white man's knowledge of Negro life is diminishing and the rate is accelerated by the present-day policy of segregation. This operates practically to make an ever-widening gulf between the two races which leaves each race more and more ignorant of the other. Without contact there cannot be knowledge; segregation reduced the contacts, and so knowledge and understanding decrease. With decreasing knowledge comes increasing distrust and suspicion, and these in turn engender prejudice and even hatred. So a vicious circle is established whose ultimate effect, unless counteracted, must be a separation of the races into more or less opposing camps, with results as disastrous to the spirit of American institutions as to the genuine progress of both races." Moton, *What the Negro Thinks*, 5. See also Dollard, *Caste and Class in a Southern Town*, *supra*, 73.

Experience and informed opinion are in agreement that normal contacts between the races diminish prejudice while enforced separation intensifies it.[62] Race relations are improved by living together,[63] working together,[64] serving together,[65] going to school together.[66] The absence of a color line in certain countries goes far to show that racial prejudice is not instinctive or hereditary, but is rather kept alive by man-made barriers such as segregation.[67]

The experience of the Sperry Gyroscope Company is noteworthy. Its employment of Negroes began in 1941 and steadily progressed until, by 1944, one-third of its Negro employees were in highly skilled occupations, one-third in semi-

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[62] Sancton, *Segregation: The Pattern of a Failure*, Survey Graphic (Jan. 1947), p. 10; Yarros, *Isolation and Social Conflicts*, 27 American Journal of Sociology, 211.

[63] *To Secure These Rights*, Report of the President's Committee on Civil Rights, 85–86; Lee & Humphrey, *Race Riot*, 17.

[64] Brophy, *The Luxury of Anti-Negro Prejudice*, 9 Public Opinion Quarterly 456; Oppenheimer, *Non-Discriminatory Hospital Service*, 29 Mental Hygiene 195.

[65] *Studies in Social Psychology in World War II*, vol. I, pp. 594–595; Nelson, *The Integration of the Negro into the United States Navy* (Navy Dept., 1948), 71–72.

[66] *Race Riot*, *supra*, p. 17; Ware, *The Role of Schools in Education for Racial Understanding*, 13 Journal of Negro Education, 421–424.

[67] Pierson, *Negroes in Brazil*, 336, 344–350.

skilled, and one-third in other jobs.[68] In the words of the president of the company:

> The initial employment of Negroes and each subsequent extension of their employment into new categories was received with doubt by the supervisors, and, in some cases, by rumblings and even threats of trouble from some groups of white workers. The threats never materialized, the doubts disappeared and were succeeded by friendliness and cooperation in helping the Negro to learn his new job and to progress to a better one. I know of no instance now where the Negro worker is not judged entirely on the basis of his competency and without consciousness of his race.

A marked change in attitude occurred in white soldiers who served in combat with Negro troops. Two out of three admitted that at first they had been unfavorable to serving with Negro troops. Three out of four stated their feelings had changed after service with them in combat. And a survey of opinion of white servicemen on the question of including Negro and white platoons in the same company showed that their willingness to accept such integration was in direct ratio to their closeness to actual combat experience with Negro troops.[69]

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[68] Gillmor (president of Sperry Gyroscope Co.), *Can the Negro Hold His Job?*, National Association for the Advancement of Colored People Bulletin (Sept. 1944) 3–4.

[69] Report No. ETO–82, Research Branch, European Theatre of Operations of the Army, as summarized in *To Secure These Rights*, *supra*, 83–85.

Rebellion against constituted authority (parental, school or state) is, for the adolescent, a normal manifestation of growth toward independence. But, in the case of many, the apparent hypocrisy of a society professing equality but practicing segregation and other forms of racial discrimination furnishes justification and reason for the latent urge to rebel, and frequently leads to lasting bitterness or total rejection of the American creed and system of government.

Recently a Congressional committee summoned "Jackie" Robinson, the Negro baseball star, as a witness to rebut certain widely publicized statements which had questioned the loyalty of large numbers of the Negro race. He testified: [70]

> Just because Communists kick up a big fuss over racial discrimination when it suits their purposes, a lot of people try to pretend that the whole issue is a creation of Communist imagination.
>
> But they are not fooling anyone with this kind of pretense, and talk about "Communists stirring up Negroes to protest," only makes present misunderstanding worse than ever. Negroes were stirred up long before there was a Communist Party, and they'll stay stirred up long after the

[70] *Hearings Regarding Communist Infiltration of Minority Groups, Part I*, House Committee on Un-American Activities, 81st Congress, 1st Sess., p. 479.

party has disappeared—unless Jim Crow has disappeared by then as well.

In our foreign relations, racial discrimination, as exemplified by segregation, has been a source of serious embarrassment to this country. It has furnished material for hostile propaganda and raised doubts of our sincerity even among friendly nations. A letter from Mr. Dean Acheson, then Acting Secretary of State, to the Fair Employment Practice Committee on May 8, 1946, stated:[71]

> * * * the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. * * *
>
> I think it is quite obvious * * * that the existence of discriminations against minority groups in the United States is a

[71] Quoted in *To Secure These Rights*, *supra*, 146–147.

handicap in our relations with other countries.

Recent remarks of representatives of foreign powers in a subcommittee of the United Nations General Assembly typify the manner in which racial discrimination in this country is turned against us in the international field.[72] The references to this subject in the unfriendly foreign press are frequent and caustic.[73]

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[72] In discussing a Bolivian proposal concerning aboriginal populations of the American continent, the Soviet representative said:

> Guided by the principles of the United Nations Charter, the General Assembly must condemn the policy and practice of racial discrimination in the United States and any other countries of the American continent where such a policy was being exercised. (United Nations, General Assembly, *Ad Hoc* Political Committee, Third Session, Part II, Summary Record of the Fifty-Third Meeting (May 11, 1949), p. 12.)

Another Soviet representative stated:

> In the southern states, the policy of racial discrimination was actually confirmed by law and most strictly observed in trains, restaurants, cinemas, and elsewhere (*id.*, Summary Record of Fifty-Fourth Meeting (May 13, 1949), p. 3).

The Polish representative said:

> The representative of Poland did not, however, believe that the United States Government had the least intention to conform to the recommendations which would be made by the United Nations with regard to the improvement of living conditions of the coloured population of that country (*id.*, p. 6).

[73] Thus an article in *The Bolshevik* (U. S. S. R.) No. 15, 1948 (Frantsov, *Nationalism—The Tool of Imperialist Reaction*), contain the statement: "The theory and practice of racial discrimination against the Negroes in America is known to the whole world. The poison of racial hatred has

Our opposition to racial discrimination has been affirmed in treaties and international agreements. The Charter of the United Nations has been approved as a treaty (59 Stat. 1213). By Article 55, the United Nations agree to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (59 Stat. 1046).

At the Inter-American Conference on Problems of War and Peace at Mexico City in 1945, this country joined with the other participants in adopting Resolution No. 41, which reaffirms the principle of equality of rights and opportunities for all men "regardless of race or religion" and recommends that the Governments of the American Republics make every effort to prevent in their respective countries "all acts which may

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become so strong in post-war America that matters go to unbelievable lengths; for example a Negress injured in a road accident could not be taken to a neighbouring hospital since this hospital was only for 'whites.'" Similarly, in the *Literary Gazette* (U. S. S. R.) No. 51, 1948, the article *The Tragedy of Coloured America*, by Berezko, states "It is a country within a country. Coloured America is not allowed to mix with the other white America, it exists within it like the yolk in the white of an egg. Or, to be more exact, like a gigantic ghetto. The walls of this ghetto are invisible but they are nonetheless indestructible. They are placed within cities where the Negroes live in special quarters, in buses where the Negroes are assignd only the back seats, in hairdressers where they have special chairs."

provoke discrimination among individuals because of race or religion." [14]

Racial segregation enforced by law hardly comports with the high principles to which, in the international field, we have subscribed. Our position and standing before the critical bar of world opinion are weakened if segregation not only is practiced in this country but also is condoned by federal law.

Mr. Justice Harlan said in his memorable dissent in the *Plessy* case (163 U. S. at 562):

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

Various subterfuges have been employed during the years since the adoption of the Thirteenth and Fourteenth Amendments to evade and nullify the effects of their provisions. The emancipation of an entire race has proved a most complicated task. More than three-quarters of a century has not been enough time within which to break down the barriers surrounding the enslaved, and to

[14] Department of State Publication 2497 (Conference Series 85) p. 109.

bring them to the full dignity and stature of free citizens. Discrimination, political, economic, and social, is still widespread. However, there are indications that the process of education, of lessening the incidence of unreasoning prejudice, lagging for so many years, is increasing in momentum.

Racial antagonisms become acute in localities, and it is there that discriminatory acts are practiced, legislation is enacted and on occasion validated by courts unwittingly responding to their environment. And so this Court has been faced through the years with one controversy after another in which efforts were made to obtain approval of measures cleverly calculated to keep the Negro in bondage, to prevent him from enjoying his full rights as a citizen, and to pervert the true intent and meaning of the Thirteenth and Fourteenth Amendments. This Court has stricken down acts of local law-making bodies and officials depriving the Negro of the right to vote, to serve on petit and grand juries, and of the right to acquire and use property. More recently, it has restrained judicial enforcement of racial restrictive convenants on real property. In other fields, this Court has acted to compel local authorities to provide the Negro with opportunities for education previously denied him.

The evasions and violations of the Constitution are being gradually eliminated. One handicap is

the approval, given in another day and generation, to the proposition that the Constitution could be satisfied and friction removed by the establishment of "separate but equal" facilities. Experience has shown that neither the Constitution, nor the laws enacted under its authority, nor the individuals affected, are given the required respect and status under such an arrangement. "Equal" facilities, if separate, are rarely if ever equal, even in a physical sense. In most situations they have been used to cloak glaring inequalities. And the very idea of separate facilities or separate rights, is in itself a negation of the full and complete possession of privileges and immunities of citizenship.

So long as the doctrine of the *Plessy* case stands, a barrier erected not by the Constitution but by the courts will continue to work a denial of rights and privileges and immunities antagnostic to the freedoms and liberties on which our institutions and our form of government are founded. "Separate but equal" is a constitutional anachronism which no longer deserves a place in our law. The Court has said that "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27. It

is neither reasonable nor right that colored citizens of the United States should be subjected to the humiliation of being segregated by law, on the pretense that they are being treated as equals.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed and that the Interstate Commerce Commission should be directed to enter an order prohibiting the railroad from furnishing dining car service to passengers segregated on a basis of race or color.

PHILIP B. PERLMAN,
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OCTOBER 1949.

APPENDIX

RAILROAD'S DINING CAR REGULATIONS

Regulations adopted in July 1941

Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them. [R. 186.]

Supplementary regulations adopted August 6, 1942

Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtains should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you. [R. 186–187.]

Regulations effective on and after March 1, 1946

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946. [R. 7–8.]

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 248) is reported in 80 F. Supp. 32. The reports of the Interstate Commerce Commission involved (R. 4, 184) are reported 269 I. C. C. 73, 258 I. C. C. 413, respectively.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix hereto.

QUESTIONS PRESENTED

The ultimate question is whether or not the order of the Interstate Commerce Commission (R. 11, 12), entered September 5, 1947, dismissing the complaint of appellant Elmer W. Henderson, is valid. This question relates to the report finding (R. 10), upon which the order is based, that "the dining-car regulations established by defendant, effective March 1, 1946, and currently in force, are not shown to be in violation of Section 3, or of any other provision of the act. An order for the future is not necessary."

Subordinate questions relate to the very limited issues presented by the complaint to the Commission, as amended at the first hearing, and as there stated by the Examiner, agreed to by complainant, and by counsel for complainant and defendant railroad. Thus formed issues are limited to alleged violations of the Interstate Commerce Act. The complaint as amended alleges violations of Section 3 of said Act by said defendant in, (1) refusing to serve complainant, (2) by providing unequal, insufficient dining car tables and service, (3) by humiliating, impractical, discriminating, and unfair use of curtained tables, (4) by giving unlawful, discriminatory and unnecessary preference and advantage to certain white persons, and in failure to serve complainant at tables reserved for Negroes where some of those vacant seats were occupied

by white persons. (R. 82.) It was also alleged that defendant violated Section 4 of said Act in failing to provide reasonable facilities for, and to make reasonable rules and regulations with respect to dining car operations.

The Commission found in the first report (R. 19),[1] that "complainant was subjected to undue and unreasonable prejudice and disadvantage" in respect to failure of the railroad to serve him. This finding sustains the complaint allegations (1) and (4), and all other allegations insofar as the incident experienced by the complainant is concerned. The Commission found (R. 194) that no award of damages could be made, which was conceded by counsel for complainant. (R. 90.) There is no further question respecting the incident of May 17, 1942. There remain only questions, stated in the complaint prayer (R. 83), that defendant railroad be ordered to cease and desist from such violations, and in future to establish, apply and enforce for transportation of complainant and other Negro interstate passengers equal and just dining car facilities and such other facilities as the Commission may consider reasonable and just, and that said defendant be required to remove and discontinue the impractical, unequal, humiliating, and discriminating use of curtained tables which are reserved for Negroes.

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[1] 258 I. C. C. 413, 419.

The railroad has already established new rules and regulations for the future (R. 7), which specifically provide "equal but separate accommodations" for white and colored passengers, in its dining car service. The Commission found the amended regulations to be adequate and reasonable provision for equality of service (R. 8) and this was approved by the lower court (R. 256). In practical effect this reduces subordinate questions to two, viz; (1) whether or not the amended dining car regulations adequately and reasonably provide for equality of service and treatment for Negro interstate passengers, and (2) whether or not separation of white and colored passengers, as required by the present regulations is, per se, a discrimination against the colored, a preference of the white, under the Interstate Commerce Act, or constitutes a violation of any provision of such Act.

On this basis the issues presented by this appeal may be stated as follows:

(1) Whether the Southern Railway dining car rule, effective on and since March 1, 1946, constitutes or results in a violation of any provision of the Interstate Commerce Act.

(2) Whether application and enforcement of said rule constitutes or violates any constitutional right of any person, and if so, what, if any, authority or jurisdiction is vested in the Interstate Commerce Commission to hear and decide such a question.

STATEMENT

This is a direct appeal from a final decree (R. 265) of a specially constituted district court, in and for the District of Maryland, dismissing the complaint of appellant (R. 1–12), seeking to set aside an order of the Interstate Commerce Commission (R. 11–12), arising under the following circumstances:

1. Commission proceedings

By complaint filed October 10, 1942 (R. 80–83) against the Southern Railway Company [a corporation, defendant], it was alleged that complainant, a Negro, was a first-class passenger on a southbound train of said defendant railroad, leaving Washington, D. C., at 2:00 o'clock P. M., May 17, 1942, and about 5:25 P. M. he applied for dining car service, at which time the two tables reserved for Negro passengers were occupied by white passengers, with vacant seats in other part of the diner; that the dining car steward advised him to return to his Pullman and wait until notified that he could be served, which he did, but was not so notified; that later complainant twice returned to the diner and each time found white passengers at the tables reserved for Negroes with vacant seats in the other part of car, and upon demand to be served, was refused and offered service in his Pullman, or in the dining car when all white passengers had left the car, or when all seats at the tables reserved

for colored people were vacant; that complainant returned to his Pullman each time without service, and had not been served when the diner was taken off; that defendant's action was unjust, unlawful, disadvantageous, unreasonable, discriminatory, and in violation of the National Transportation Policy (49 U. S. C. Notes preceding sections 1, 300, and 90) in violation of Section 3 (1), of the Interstate Commerce Act, in providing unequal service and insufficient dining tables, by impractical, humiliating, discriminating and unfair use of curtains around reserved tables, and by giving unlawful and discriminatory preference to white passengers; and that defendant violated Section 41, Chapter 2, Title 8, U. S. C., Section 43, Chapter 3, Title 8, U. S. C., Section 4, Title 49, U. S. C., and clauses 1 and 2, Section 2 of Article IV of the United States Constitution. The complaint prayed that, (1) defendant be required to answer the charges, (2) that after hearing defendant be ordered to cease and desist from the alleged violation of the Act, and in future to establish, apply and enforce, for Negro interstate passengers, equal and just dining car facilities, and such other services and facilities as the Commission may consider reasonable and just, (3) that defendant be required to remove and discontinue the use of curtains around tables reserved for Negroes, (4) that reasonable damages, costs, and attorneys' fees be assessed against de-

fendant, and (5) that such other orders be issued as the Commission may deem just.

The Southern Railway Company answered said complaint November 6, 1942 (R. 84), and a hearing was held before a commission Examiner on February 24, 1943 (R. 86), at which complainant and defendant railroad were represented by counsel. At the hearing, paragraphs VI, VII, and IX of the complaint (R. 82–83), were stricken, by agreement of counsel, as not within Commission jurisdiction (R. 88–90), and the complaint prayer for attorneys' fees and costs (R. 83) was stricken by agreement (R. 90), as not provided for under the Interstate Commerce Act. Issues involved in the proceeding were stated by the hearing Examiner, with approval of complainant and his counsel (R. 87), as alleged racial discrimination in refusal of defendant railroad to provide complainant with accommodations equal to those furnished white passengers, in violation of Section 3 of the Interstate Commerce Act, and the Fourteenth Amendment to the Constitution of the United States, guaranteeing equality of rights and protection under the laws, with the prayer that the Commission direct defendant to cease and desist from the alleged unjust and discriminatory practices, and to establish for the future equal and just dining car treatment and facilities for Negro interstate passengers.

There is no conflict in the record evidence that complainant was a passenger on the Southern

Railroad on the date alleged, twice applied for dining service which was both times denied because the two tables reserved for colored passengers were occupied by white passengers, that the dining car was removed from the train about 9:30 P. M. without serving complainant, and that an offer to serve him at his train seat was refused. Also there was no question as to the railroad regulation in force at that time (R. 165–166),[2] or as to the supplemental instructions issued August 6, 1942 (R. 66–67).[3]

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[2] Section 2. Dining Cars: Meals should be served to passengers of different races at separate times. If passen- [fol. 266] gers of one race desire meals served while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them.

[3] "Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

[fol. 115] "After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"'Reserved' cards are being supplied you."

There are conflicts respecting certain other evidence. Complainant testified that the diner was not crowded (R. 91) and that the two-seater reserved table had one vacancy, the four-seater reserved table had two vacancies, with vacant seats in the other part of diner (R. 92). The steward testified that the diner was filled before he first saw complainant and remained so until taken off (R. 122), that when first seen complainant was coming around a line of people waiting to enter the crowded diner, and he (the steward) first thought complainant was passing through, but when a seat was vacated he (complainant) started to take it, was stopped and informed that he was not first, that other people had been waiting before he arrived and that better service could be given him in his train seat, which was refused, and after waiting several minutes he left and was not seen for some time. (R. 110–111.) A dining car waiter testified that the car was filled from time service began until they quit serving (R. 138), that at complainant's first visit there was one vacancy at the reserved four-seater table, and the reserved two-seater table was full (R. 143–144), that he saw complainant in the diner twice, at both times the two reserved tables were occupied and a line of people were waiting to be served (R. 141).

Changes in rules and dining car service to meet the needs of vastly increased travel in war emergency, as stated by a Southern Railway of-

ficial, began in 1941 when the former practice of serving the different races at different times was discontinued (R. 166), and use of curtained tables providing separation of races was instituted. Then followed use of reserved card on curtained tables, leaving those tables vacant until remainder of car was full. Then 36-seat diners were increased to 48 seats (R. 167). Instructions of August 6, 1942 (R. 163), provided that the curtained tables were not to be used by white passengers until all other seats in the car had been taken, and if no colored passengers had then applied those tables could be assigned to white passengers, with the further provision that colored passengers later applying should be advised that they would be served as soon as those compartments were vacated. The Southern Railway operates in the southern states of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana, Tennessee, and Kentucky, and rules for segregation of races were adopted by the railroad to conform to the feeling and attitude of the people in those states, and as a means to preserve peace and order. In the opinion of this witness the seating of colored and white passengers together would create discord and probably end in a race riot (R. 169).

Following the hearing, submission of proposed report and order by Examiner, and exceptions by complainant, a Division report (R. 184) and order (R. 195) were entered May 13, 1944. The

report (R. 185) noted statement in brief of complainant that:

> The specific conduct of which complaint is made and upon which this litigation rests is the defendant's refusal and failure to seat the complainant at a vacant seat at tables allegedly reserved for colored passengers at a time when those tables were partially occupied by white passengers and at a time when the complainant sought service; and the refusal of the defendant to notify the complainant when he could be served, as promised, before the diner was taken off at Greensboro, N. C., with the result that the complainant was never served.

Following a résumé of record evidence, including the supplemental dining-car instructions of August 6, 1942 (R. 185–190, incl.), the report entered its findings of fact (R. 190–191), concluding with the finding:

> It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding [fol. 300] with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end

table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from wartime conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

Based upon these facts the Division found that complainant had been subjected to undue and unreasonable prejudice and disadvantage (R. 191) and that existing instructions appeared adequate for the future, making an order unnecessary (R. 192). In respect to damages claimed, the report found that jurisdiction to award is controlled by Section 8 of the Interstate Commerce Act (R. 192), with right to recover there-

under limited to pecuniary loss (R. 193).* On the basis of such subordinate findings the report found that "no basis for an award of reparation for damages has been shown" (R. 194). In respect to the question of segregation, the report stated (R. 190–191):

> The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate passengers. See *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71, and cases therein cited. Section 3 (1) of the act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In *Mitchell* v. *United States*, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus, it is seen that substantial equality of treatment only is required of the carrier.

* Citing *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 206.

Accordingly an order was entered May 13, 1944, dismissing the complaint, and petition of complainant for further hearing was denied by order of the Commission, dated September 18, 1944 (R. 95).

Thereafter complainant brought action in the United States District Court for the District of Maryland, seeking to annul the Commission order of May 13, 1944, and a statutory three-judge Court in that district, by decree entered February 18, 1946 (R. 79–80) annulled and set aside the said Commission order and remanded the proceedings for further consideration in the light of the Court opinion.[5] The Court opinion (R. 69) noted the concession by plaintiff that denial of damages is not reviewable (R. 68), stated the issues as (1) Is any form of racial segregation of interstate passengers in dining cars a preference, prejudice or discrimination, in and of itself, in violation of the Civil Rights Act, or the Interstate Commerce Act, or both; and (2) even if a certain degree of such segregation be valid, are present rules of defendant railroad respecting dining service nevertheless invalid because they do not provide substantial equality of treatment? The opinion (R. 72–74) reviewed prior authorities respecting the equal rights

[5] *Henderson v. United States*, 63 F. Supp. 906.

clause of the Constitution, Article IV, Section 2,[6] rights under the Fourteenth Amendment,[7] and the power of Congress to legislate specifically, under the Commerce Clause of the Constitution, respecting segregation in interstate travel,[8] and concluded that neither Article IV, Section 2, nor the Fourteenth Amendment provided any prohibition against segregation, that the Supreme Court has repeatedly declared that race segregation by State law is not *per se* an abridgment of any constitutional right, that Congress has constitutional power to legislate as to segregation in interstate travel which has not been exercised, therefore equivalent to a declaration that interstate carriers can separate Negro and white passengers, if substantial equality of treatment is afforded members of both races. The opinion clearly decided (R. 74), "that racial segregation of interstate passengers is not *per se* forbidden by

[6] *Downham* v. *Alexandria Council*, 10 Wall. 173; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522; *United States* v. *Wheeler*, 254 U. S. 281; *Whitfield* v. *Ohio*, 297 U. S. [fol. 121] 431; *Hague* v. *C. I. O.*, 307 U. S. 496.

[7] *Slaughter House Cases*, 16 Wall. 36; *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *Atchison, T. & S. F. Ry.*, 235 U. S. 151; *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337.

[8] *Hall* v. *DeCuir*, 95 U. S. 485; *Louisville, etc., Railway Co.* v. *Mississippi*, 133 U. S. 587; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388.

the Constitution, the Interstate Commerce Act, or by any other Act of Congress."

In considering the second question, the Court held (R. 74–78, incl.) it necessary to pass upon the validity of dining car regulations of the Southern Railway then in effect, the supplemental instructions effective August 6, 1942. The Court decided that the Commission erred in holding that these rules will result in no substantial inequality of treatment, for the reason that there was no provision of tables exclusively for Negro passengers, although most of the tables were exclusively reserved for white passengers. For such reasons the Commission order of May 13, 1944, was annulled, set aside, and remanded for further consideration.

Thereafter the Commission reopened the proceeding, in view of the Court decree, and ordered a further hearing which was held on October 15, 1946. At the beginning of the hearing counsel for complainant announced that he would offer no testimony, stating his opinion that there was no question, under the Court decree, as to facts, and that the only matter for consideration was the law and new or certainly different regulations (R. 197). Defendant then offered its testimony.

The Assistant Vice-President in charge of Transportation operations offered the Circular effective March 1, 1946, respecting segregation of white and colored passengers in dining cars (R. 223):

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored pasengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

The witness testified that the rules were changed to conform with the court opinion in *Henderson* v. U. S., *supra*. Also identified and offered were a series of photographs (R. 224, A, B, C, and D) of a permanent partition arrangement in one car, showing how the table exclusively assigned colored patrons is placed in relation to other tables and dining car facilities. The witness described the

permanent partition car in detail and stated that the railroad planned to equip all diners in the same way as soon as the cars were sent to the shops for repairs (R. 201), and expressed the opinion that under the amended instructions, including the permanent partition arrangements, equal facilities would be furnished both races.

The Superintendent of Dining Cars testified that he had conducted a test check of the number of white and colored passengers using dining service on the Southern Railway between Atlanta and Washington (R. 215) the test made upon his instruction and supervision, the check being made by each steward and turned in at end of his trip, the records offered in the Court being compiled from such reports, in witness's office (R. 218). The first check covered the period May 14 to 24, 1945, and the compilation is Exhibit 8 (R. 225–236, incl.), which shows the totals of dining cars, trains, kind of meals, total meals served, and number of colored passengers served for each meal, each diner, and each train, separately for each day and total for the test period. A similar test check was made for the period October 1 to 10, 1946, with reports and compilations in the same manner, offered as Exhibit 9 (R. 237–247, incl.). Total meals served during the 1945 check (R. 225) were 37,615, of which 36,463 were to white passengers, and to colored passengers 706 military and 446 civilian. The colored patrons, military and civilian, represented

3.06 percent of all meals served, of which 1.19 percent were civilian.[9] The same totals for the 1946 test period (R. 237) show total meals 20,789, with 19,917 to white, and 872 to colored, civilian 723, military 149, and in percentages 3.48 percent civilian colored and 95.80 percent white. Under current rule tables are assigned exclusively to white and to colored passengers, in ratio of ten to one, respectively (R. 211), which, in the opinion of Vice-President McClain (R. 207) adequately accommodates dining car patrons at the present time, and from experience will be sufficient for the future.

Following submission of the Examiner's proposed report, the filing of exceptions thereto, and submission of oral argument, the Commission entered its report on further hearing, September 5, 1947 (R. 4–11, incl.).[9] The report noted the Court holdings in the prior action, *Henderson v. United States, supra,*[10] to the effect that defendant's dining car regulations then in effect did not provide equality of treatment, required by Section 3 (1) of the Interstate Commerce Act, and were not adequate for the future (R. 5); that racial segregation of interstate passengers is not *per se* forbidden by the Constitution or by any Act of Congress, and that failure of Congress to exercise its power under the commerce clause of the Constitution to legislate with respect to

[9] 269 I. C. C. 73.

[10] 63 F. Supp. 906.

race segregation, is equivalent to a declaration that interstate carriers may separate white and Negro passengers, provided equality of treatment is accorded both races traveling under the same conditions (R. 6); and that the real question involved is not segregation but one of equality of treatment, not involving State segregation laws as neither the defendant railway nor the Commission relied upon those laws.

The report quotes the new dining car regulations, effective March 1, 1946, reviews the plan there established, and approved the results in the following statement (R. 8):

> The current regulations were designed by the defendant to meet the court's criticisms of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has abolished its former practice, condemned by the court, of permitting white patrons to be [fol. 11] seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for members of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no circumstances are white passengers served in such space; nor are colored passengers served elsewhere

> in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

In respect to adequacy of the space assigned colored passengers the Commission found as follows (R. 9):

> As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 percent during the May 1945 test period to 3.48 percent during the October 1946 period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space.

The report further overruled the contention of plaintiff that use of curtains results in preference and prejudice, and subjects Negroes to humiliation and embarrassment not experienced by white passengers, in the following statement (R. 9–10):

> With respect to the contention of complainant that the use by defendant of curtains or partitions, as described, violates the rule of substantially equal treatment, and results in undue preference and prejudice, in that Negroes are subjected to humiliation and embarrassment not ex-

> perienced by white passengers, the statutory court stated that the method of carrying into effect the principle of segregation approved by the Supreme Court is for us to determine. In ***Mays*** v. ***Southern Ry. Co.***, 268 I. C. C. 352, decided April 8, 1947, after concluding that the evidence did not justify a finding that equality of treatment can result only from the discontinuance of segregation in dining cars, we found that the dining-car regulations under consideration herein were not shown to be in violation of section 3 or of any other provision of the act we administer. The record in the instant proceeding does not warrant a different conclusion; nor does it afford sufficient justification for condemning the methods by which defendant separates the tables reserved for white and colored patrons.

The report also overruled the contention of complainant that defendant's current regulations constitute a burden on interstate commerce, in the following statement (R. 10):

> [fol. 12] In support of his position that defendant's current regulations constitute an undue burden on interstate commerce, the complainant relies upon the recent decisions of the Supreme Court in *Morgan* v. *Virginia*, 328 U. S. 373, and of the United States Court of Appeals for the District of Columbia in *Matthews* v. *Southern Ry. System*, 157 Fed. (2d) 609, wherein statutes of the State of Virginia requiring the sep-

aration of white and colored passengers on interstate motorbuses and railroad coaches were held unconstitutional and invalid. The cited cases are readily distinguishable from the instant proceeding. They involve the power of a State to regulate interstate commerce, whereas the issue here concerns regulations of an interstate carrier. As stated previously herein, the statutory court in *Henderson v. United States, supra,* pointed out that it was not necessary to approach the case from the aspect of State segregation laws, and concluded that the inaction of Congress respecting segregation means that interstate carriers may separate white and colored passengers if substantial equality of treatment is accorded both races when traveling under like conditions. Defendant's dining-car regulations apply only to service in dining cars, which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemned as imposing an undue burden on interstate commerce. We think it evident that the cases to which the complainant refers are not determinative of the issues herein.

The ultimate finding affirms that of the prior report that complainant was subjected to prejudice and disadvantage upon the occasion involved and adds, "We further find that the dining-car regulations established by defendant effective March 1, 1946, and currently in force, are not shown to be in violation of Section 3, or any other provision of the Act. An order for the future is not necessary" (R. 10). Accordingly an order was entered the same date dismissing the complaint (R. 11–12).

2. Proceedings in the District Court

Complaint herein, seeking to set aside and enjoin the Commission order of September 5, 1947, was filed November 18, 1947. Alleged errors were: paragraph 7 (R. 2), that the railroad violated Section 1 (4) of the Act, in that it failed to provide reasonable facilities and to make reasonable rules and regulations with respect to operation of through routes; paragraph 8 (R. 3), that the railroad violated Section 3 (1) of the Act in that it practiced undue and unreasonable preference and disadvantage against plaintiff and subjected him to unlawful and humiliating use of a curtained table allegedly reserved for colored passengers, and by giving unlawful, discriminatory and unnecessary preference to white passengers, in seating them in the diner and refusing him service solely on account of his color; paragraph 9 (R. 3), that enforcement by the railroad of its

alleged regulation and any regulation requiring separation of passengers according to race or color is unreasonable, unlawful and violative of his constitutional rights as a passenger traveling in interstate commerce, and that the railroad has no authority to issue or enforce any such regulation, nor is it within the power of the Interstate Commerce Commission so to approve; and paragraph 10 (R. 3), that the Commission order of September 5, 1947, is without rational basis, was issued in error, and if allowed to become effective will result in irreparable harm to plaintiff and deprive him of his liberty without due process of law, all in violation of his constitutional rights. The complaint prayer (R. 3) is that the Court find the refusal of the Commission to issue a cease and desist order against the alleged violation is erroneous and in contravention of the rights of plaintiff; that the Court enter a preliminary injunction restraining enforcement of the Commission order dismissing the petition of plaintiff, that upon final hearing the said order be set aside, and for such other relief as the Court may deem just and proper.

The United States and the Interstate Commerce Commission were each named defendants in said complaint (R. 4), and the Southern Railway Company intervened with court approval. The United States, by and through its Assistant Attorney General and United States Attorney filed answer on December 24, 1947 (R. 12–13),

in which it was alleged that the Commission order of September 5, 1947, "was duly made upon substantial evidence, and in accordance with applicable law and was and is in all respects valid and lawful." The Commission filed its answer February 5, 1948 (R. 13–16, incl.), in which it was alleged the order of September 5, 1947, was and is valid and lawful, that the report findings and conclusions were entered after a full and fair hearing, and were and are fully supported and justified by the evidence, and that the report and order did not exceed the authority conferred upon it by law. Intervenor Southern Railway Company filed its answer on June 4, 1948 (R. 16–17), adopting the Commission answer.

A final hearing was held by the Court on June 4, 1948 (R. 17–53, incl.), and the action submitted upon the record offered (R. 53–63, incl.), under pleadings, briefs, and oral argument of counsel for plaintiff-appellant (R. 18–26, incl.), for defendant the United States by a Special Assistant to the Attorney General (R. 26–29, incl.), for defendant the Interstate Commerce Commission (R. 30–35, incl.), and for intervenor the Southern Railway (R. 35–47, incl.). Opinion of the court (R. 248–265, incl.)[11] was filed September 25, 1948, decree dismissing complaint (R. 265) was filed October 28, 1948, and petition for appeal (R. 266), assignment of errors (R. 266–269, incl.), and order al-

[11] 80 F. Supp. 32.

lowing appeal (R. 269) were filed November 17, 1948.

The court opinion reviewed the record of the Commission proceeding, including the amended dining-car rule, and the prior court action and opinion, and upon the basis of record checks of passengers (R. 254) held that "the conclusion is inescapable, that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space" (R. 255). In respect to the amended dining-car rules, the opinion held (256–257):

> We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission [fol. 387] has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the kitchen end of the dining car, directly opposite the space newly provided for the stewards office. The undesirability of this location compared with that of tables in

> other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, non-existent. Therefore, it necessarily follows that this present complaint must be dismissed unless the Supreme Court has, in some decision or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation.

The opinion considered *Morgan* v. *Virginia,* 328 U. S. 373, and *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28 (R. 257), and held that the Morgan case required no change in the prior court decision herein, that "the real question before us is not one of segregation, but equality of treatment", and further said (R. 258):

> That the Supreme Court in the *Morgan* case very definitely recognized the distinction between the two types of cases, namely those involving the validity of a State statute [fol. 389] and those involving the rule of a carrier requiring segregation of interstate passengers, is indicated by the following footnote on page 377 of its opinion: "When passing upon the rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' *Chiles* vs. *Chesapeake*

& Ohio R. R. Co., 218 U. S. 71, 75." See also *Simmons* vs. *Atlantic Greyhound Corporation*, 75 F. Supp. 166; *Stamps* vs. *Louisville & Nashville Railroad Co.*, I. C. C. [269 I. C. C. 789].

"The Commission in its report now under review, clearly stated, we think the distinction between the two types of cases in the following language (269 I. C. C. 73 at [77]: "Defendant's dining car regulations apply only to service in dining cars which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemn as imposing an undue burden on interstate commerce."

In respect to the *Bob-Lo* case, the opinion (R. 259) in distinguishing that case from the *Morgan* case and from *Hall* v. *DeCuir*, 95 U. S. 485, quoted from the Bob-Lo opinion, at pages 39-40 as follows (R. 259):

The regulation of traffic along the Mississippi River, such as the Hall case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's

highly localized business, and those decisions are not relevant here.

The opinion further held that the deed covenant decisions in *Shelley* v. *Kraemer*, *Hurd* v. *Hodge*, *McGhee* v. *Sipes*, and *Uricolo* v. *Hodge*,[12] "obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden" (R. 259). The opinion disagreed with *Matthews* v. *Southern Railway Company*, 157 F. 2d 609, 610, where the only issue was correctness of the trial judge's charge to the jury in a race segregation case, and a footnote reference to the *Morgan* case said it could see "no valid distinction between segregation in buses and in railroad cars," and held "there is a very definite distinction from the aspect of dining car accommodations during railroad transportation" (R. 260).

The conclusion of the opinion was as follows (R. 260):

> To summarize and conclude: (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or [fol. 391] any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as

[12] 334 U. S. 1, and 334 U. S. 24.

long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I. C. C. 73 at [76]): "Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future." To the argument that proportionate allotments of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is *any* empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach—which must be this Court's approach to the question—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, *every* seat in the dining car may be occupied.

Circuit Judge Soper entered a dissenting opinion (R. 261–265, incl.), agreeing with the

majority except for approval of the amended dining car rule. In respect to that rule the dissenting opinion held (R. 261) that inequality would result if and when more than four colored passengers applied for dining service at the same time, since the reserved table had only four seats. The basis of this opinion is that the railroad must provide sufficient table space for any number of colored passengers, even though no advance knowledge of that number could be possible. This opinion said, "Segregation in railroad traffic may be maintained if there are sufficient accommodations for all;" (R. 261). This seems to say that dining space must be provided for all colored people, although the same rule would not apply to white passengers, and despite the record evidence showing that white percentage greatly exceeded colored, practically every meal according to the two ten-day checks made in 1945 and 1946 (R. 225–236, incl., and 237–247, incl.). A rule based upon this principle assumes that during the dining period of some four hours, if there were 8, 10, or 12 colored diners, all of them would demand service at the same moment. There is no record evidence of any such abnormal and planned demand or complaint of failure to receive service under the amended rules. The check records do show that for the 639 serving periods during these tests there were no colored diners 93 times and no more than four for 119 times, or full seating

capacity for all colored diners 212 times out of 639. At some 57 serving periods during the tests there were more than four times as many white diners as there were available tables for them. If it is correct to assume facts to sustain this reasoning, then the railroad would be required to operate four diners instead of one, upon the theory that every white diner would demand service at the same moment. It is common knowledge that all people do not eat at the same moment, and surely in this respect colored and whites may be expected to observe similar hours for their meals. According to the test records the greatest number of colored diners could have been served in some two hours of the four in which diners are open. That is more advantageous for colored than for whites, a preference rather than a discrimination. At any rate, as the court opinion noted (R. 260), the Commission found that the railroad, under the amended rule, could be expected to provide for increased colored diners when that occurred. That is in effect an order to the railroad not to prefer white over colored in assignment of space, which is also prohibited by the rule provision that there shall be equality of service.

SUMMARY OF ARGUMENT

The Interstate Commerce Act

There is no question as to Commission duty and authority under the Interstate Commerce

Act, to remove and prohibit any and all prejudice, preference discrimination, and disadvantage, prohibited by that Act. Likewise it is a duty and responsibility, in applying legislative regulations of interstate carriers, to require those carriers to make reasonable charges for services, to provide reasonable equipment and services, and to establish fair and just relationship among such carriers, and between them and the public served. This duty and authority is illustrated by the Commission action in this proceeding. Section 3 (1) of that Act makes it unlawful for any railroad to give, make or cause any undue or unreasonable preference or advantage to any person, in any respect whatsoever, or to subject any person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Commission has held, and the District Court has approved, that appellant was subjected to undue and unreasonable prejudice and disadvantage, by the Southern Railway Company, on May 17, 1942, in the failure of the dining car steward to serve said appellant as he demanded, and as was provided for under existing rules. This was found despite the Commission conclusion that the occurrence was but a casual incident, brought about by bad judgment of an employee, overloaded with work to be performed in limited space and time, due to overcrowded train because of war-time conditions. The Commission held that an award of damages is authorized

under Section 8 of the Act, but limited to pecuniary loss suffered and proved. There being no pecuniary loss suffered by appellant, no award could be made, and this was conceded by appellant, and approved by the lower court. Having found the discrimination and prejudice claimed because of this incident, no further question concerning that claim remains.

There did remain the question as to whether or not existing practices and rules were adequate to reasonably prohibit such prejudice and disadvantage for the future. The Commission found the amended rules effective August 6, 1942, adopted after the occurrence here complained of, adequate for the future. Those rules (R. 186–187) provided for two curtained tables, reserved for colored diners, not to be used by whites until all other seats were occupied, and then only if no colored had applied for service, and if passengers later applied they should be advised that they would be served as soon as those tables were vacated. In the first court action these rules and the Commission approval thereof were held unlawful, solely upon the ground that no tables were exculsively assigned to colored passengers although all others were exclusively assigned to the whites. The Southern Railroad and the Commission both recognized the correctness of that Court decision, and upon rehearing further amended railroad rules, effective March 1, 1946, (R. 7–8) providing for "equal but

separate" accommodations and exclusive use of one table for colored patrons. The Commission held the amended rules adequate for the future, as providing an equitable and reasonable division between the races of its available space, and if colored diners increased, substantial equality may require reservation of additional space in the future. The District Court approved the amended rules and the Commission findings in respect thereto, as providing reasonably equal treatment for colored passengers.

Appellant complained to the Commission (R. 81–83), and to the court (R. 55–56), and alleged violations of the National Transportation Policy, of Sections 1 (4) and 3 (1) of the Interstate Commerce Act (R. 2–3). These allegations are further stated in appellant's assignment of error (R. 266–268) and again in appellant's brief, page 5, where questions presented by this appeal are set forth. The Commission based its order upon recognizable provisions of the Interstate Commerce Act, holding first that appellant had been subjected to undue prejudice and disadvantage, on the basis of inequality of treatment, in violation of specific provisions of the Act, and second that the railroad dining car rules provided equality of treatment for the future, as required by the Act. Appellant's contention, although not clearly presented as such, that segregation in and of itself violates the Act, was rejected by the Commission, in the first report (R. 190) upon the ground that

"The Interstate Commerce Act neither requires nor prohibits segregation of races", under authority of Supreme Court decisions (R. 191) [12] and by the second report (R. 4) which affirmed the findings of the first report in that respect, and additionally found that the amended dining car rules, effective March 1, 1946, do not constitute a burden upon interstate commerce, under authority of the prior District Court opinion herein, and of *Morgan* v. *Virginia*, 328 U. S. 373, and *Matthews* v. *Southern Ry. System*, 157 Fed. 2d 609.

The first District Court opinion herein (R. 63) found the then existing railroad rule a violation of the Act in not providing equality of treatment, since tables were assigned exclusively to whites but not to colored passengers, and further held that racial segregation is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, and that inaction of Congress is equivalent to a declaration that segregation may be provided in interstate travel if substantial equality is afforded both races, under authority of cited Supreme Court decisions (R. 72–73). In the second District Court opinion (R. 248), the amended dining car rules, effective March 1, 1946, and the Commission finding thereon were approved, as being adequate future protection for equality of treatment.

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[12] *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71; *Mitchell* v. *U. S.*, 313 U. S. 80.

Although appellant vaguely contends that the treatment accorded colored passengers in assignment of diner space is unequal, on the basis of quality, it seems quite clear that the only serious claim of unequal treatment is in the separation of the races. That is the stated question in appellant's brief, and inequality of treatment otherwise is only vaguely implied. This contention is that any and all segregation of races in interstate travel by carrier regulation or otherwise is a violation of the Interstate Commerce Act, and necessarily invalidates the carrier dining car rules herein. The Commission would concede that any carrier practice, rule, or regulation which does not provide substantial treatment, or which violates any provision of the Interstate Commerce Act, is unlawful and requires Commission action in a proper proceeding to invalidate.

Appellant contends that application and enforcement of the amended dining-car rule would constitute a burden upon interstate commerce, such as was found by this Court in *Morgan* v. *Virginia, supra.* That adds a question as to possible violation of the Interstate Commerce Act. The second report of September 5, 1947, fully considers this question and clearly distinguishes the carrier rule and the facts here involved (R. 10), from the State statute and the facts involved in the *Morgan* case opinon, also from the legal and factual situation in *Matthews*

v. *Southern Ry. System, supra.*[14] The opinion of the District Court below (R. 248–258) also carefully considered the question of alleged burden upon interstate commerce, resulting from the amended dining-car rule herein, clearly distinguished the situation herein from that in the *Morgan, Matthews,* and several other recent Supreme Court decisions involving race segregation, and concluded that the rule constituted no burden upon interstate commerce. Facts and law of the case seem to warrant these holdings of the Commission and the lower courts.

The Constitution and separation of races in interstate commerce

This appeal poses the question as to whether or not race segregation per se in interstate travel, under carrier rules, is forbidden by the Constitution, and if so, what authority or jurisdiction is vested in the Commission to decide such a question. Appellant contends the Commission and the District Court below approved segregation; however, that misconceives the purpose, responsibility, and result of what was done. It was only decided that segregation is not forbidden by statute or Constitution, as interpreted by judicial authority. The Commission definitely considered such segregation as beyond its authority to approve or disapprove, and as one exclusively for determination of Congress.

[14] See also *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352.

Argument upon the constitutional question is submitted only to more fully state the Commission conception, and to refute the ardent contention of appellant that it was the duty and responsibility of the Commission, to declare invalid the railroad dining car rule upon that ground. There can be no question of the constitutional power of Congress, under the Commerce Clause, to regulate racial segregation in interstate commerce. Congress has repeatedly refused to legislate upon that subject, over a period of many years.[15] The question of racial segregation, as a violation of rights guaranteed by the Constitution, has been urged upon courts for many years, practically since the adoption of Amendments following emancipation of slaves, to safeguard their freedoms and rights, not only with respect to interstate commerce but with respect to almost every human relationship.[16] Insofar as here known no court has decided that segregation, per se, is forbidden by the Constitution. The lower court opinion held, in overruling the constitu-

[15] H. R. 8821, 75th Congress, 3rd Session, January 5, 1938; H. R. 182, 76th Congress, 1st Session, January 3, 1939; H. R. 1925, 79th Congress, 1st Session, February 1, 1945; H. R. 22, 81st Congress, 1st Session, January 3, 1949; and H. R. 831, 81st Congress, 1st Session, January 5, 1949, to cite only a partial list of bills introduced in the past 25 years.

[16] *Hall* v. *DeCuir*, 95 U. S. 485; *Civil Rights Case*, 109 U. S. 3; *Plessy* v. *Ferguson*, 163 U. S. 537; *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71; *Morgan* v. *Virginia*, 328 U. S. 373; *Missouri Ex Rel. Gaines* v. *Canada*, 305 U. S. 337; *Mitchell* v. *U. S.*, 313 U. S. 80; *Shelley* v. *Kraemer*, 334 U. S. 1.

tional contention herein, "It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress."

Appellant's brief, p. 72, states, "This Court has never ruled that segregation of passengers is permitted under the Interstate Commerce Act." That is perhaps because the Act, as stated by the Commission "neither requires nor prohibits segregation". That brief, page 55, also states, "The Commission and the Court below were of the opinion that segregation based on race abridges no rights protected by the Constitution or the Interstate Commerce Act." The Commission expressed no such opinion as to any constitutional right. Appellant also contends, brief page 74, that the Commission order herein is contrary to public policy of the United States, and, page 78, that segregation is contrary to the philosophy of our Government. This clearly contends that the Commission order is unlawful, not only as a matter of law, but also as a matter of governmental policy and philosophy, which is not a part of the Constitution or enacted statutes. Apparently appellant is unwilling to have his case decided according to existing law and judicial authority, for he says, brief pages 87–88, "what we seek is not justice under law as it is. What we seek is justice to which law in its making should conform." Appellant

really contends that the Commission erred in applying the law as it now exists, and in refusing to substitute therefor what appellant claims is justice. The lower court erred, according to appellant, in applying law as it is and not as appellant wishes it to be. In the face of repeated refusal of Congress to prohibit segregation, and repeated refusal of courts to hold that segregation is prohibited under existing law, it would have been a brazen and unwarranted usurpation of power by this administrative arm of government, to have attempted prohibition of segregation, as herein contended by appellant. The lower Court felt constrained to follow existing law and superior judicial authority, as that was understood, rather than to ignore law and decide according to the wishes of appellant.

The present law upon the subject of segregation can be changed under constitutional provisions and judicial precepts, only by Congress. The Commission has no authority to amend the present law, and its authority is derived from Congress, which has refused to change this law. This court has often held that Commission action beyond the scope of its statutory authority is unlawful.[17] Neither the Commission nor the courts have the power to legislate, or to amend the Constitution as here insisted upon by appellant.

[17] *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125.

Were the question here not related to the controversial subject of race relations it would undoubtedly be immediately conceded that the Commission has no authority to decide upon segregation under the Constitution. That does not relate alone to interstate commerce, but to all other spheres of life, schools, playgrounds, meeting places, business, and homes.

It is the position of the Commission that, (a) race segregation in interstate travel is not forbidden by the Constitution, and (b) that prohibition of segregation by the present Constitution is possible only by interpretation, not heretofore held or stated by court authority or Congress, and is not within the jurisdiction or authority of the Commission to make.

ARGUMENT

I

The Southern Railway Dining Car Regulations, effective March 1, 1946, do not constitute or result in a violation of any provision of the Interstate Commerce Act

(a) The amended dining car rule reasonably provides substantial equality of treatment for colored passengers

It is here conceded that any rule, regulation, or practice of a railroad which does not provide equal treatment for all persons, would violate Section 3 (1) of the Interstate Commerce Act, and would be unlawful. That section makes it unlawful for any such carrier "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * or to subject any

particular person, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *." This includes dining car service and prohibits any and all substantial or material difference in charge, service, facilities, and food, in preference or advantage to any particular person, or to the prejudice or disadvantage of any particular person. This provision applies to all persons alike, without reference to race, color, or any other difference or characteristic as between particular persons.

It is doubted that appellant seriously contends the dining car service of the Southern Railway, to white and colored passengers under its amended rules, effective March 1, 1946, is other than substantially equal. The somewhat vague contentions in that respect relate to inconsequential details, normally the exclusive Commission function to decide upon the record facts, or appear to be tenuous argumentative support for the real contentions with reference to separation of races. The complaint to the Commission was based upon an incident occurring to appellant during war time when trains were badly overcrowded. The railroad dining car rules and practice have since that time been twice amended to meet the Commission and Court requirements that equality of service shall be rendered in future. The Commission found in that incident that appellant was subjected to prejudice and disadvantage, in violation of Section 3 (1) of the Act. Clearly that dis-

posed of the incident and leaves only the question as to whether or not the amended rules reasonably provide for substantial equality of treatment for the future.

Appellant's complaint to the Commission (R. 83) asked that defendant-railroad be ordered to cease and desist from the alleged prejudice and disadvantage of that incident, and to establish for the future equal and just dining car facilities for complainant and other Negro interstate passengers. The finding of prejudice in the incident satisfied the relief asked in that respect, and the amended rules are intended by the railroad, so held by the Commission and the lower court, to provide equal treatment for the future. Except for the question of lawfulness in separate racial service, as *per se* constituting a prejudice or inequality of treatment, the amended rule itself provides that "equal but separate accommodations *shall be provided for white and colored passengers* by partitioning diners and the allotment of space, in accordance with the rules." [Italics supplied.] If the separate service is reasonable and lawful, in providing equal treatment, as the Commission and Court have found, then no inequality would be possible except for violation of the rule, as applied by employees, such occurrences cannot be foreseen and no reasonable assumption can be indulged that rule violation by employees will occur. If there should be such unforeseeable incident relief may

be had in courts with proper jurisdiction, where such matters may be lawfully decided.

At the first Commission hearing, February 24, 1943 (R. 87–90) issues were practically agreed upon by the Examiner and counsel for all parties, in effect that discrimination against complainant was caused by refusal to serve him as alleged, in violation of Section 3 of the Interstate Commerce Act and of the Constitution guarantee of equality of rights. It was there stated and agreed that the relief asked of the Commission was an order to cease alleged unjust discriminations, and to establish for the future *equal and just dining car treatment* for complainant and other Negro interstate passengers. Appellant's complaint in the first court action alleged violations of the Interstate Commerce Act by defendant, particularly the National Transportation Policy (R. 55) and Section 3 (1) (R. 56), by reason of alleged discrimination and prejudice, and by providing *"unequal, insufficient tables and dining car service."* [Italics supplied.] Complaint in the District Court, here involved (R. 3), alleges violation of Section 1 (4) and Section 3 (1) of the Act, appears to relate only to the contention that segregation is, in and of itself, the violation claimed. This complaint seems to have abandoned the vague prior contention that, under the amended dining car rules, equal treatment is not afforded colored passengers. Appellant's brief, page 5, states the question pre-

sented by this appeal, and therein no violation of the Interstate Commerce Act is alleged, based upon unequal treatment or service. On the contrary every question stated is based upon segregation as the only basis for alleged violation of the Act and the Constitution. Scant attention is given in the brief argument to the question of unequal treatment, and that based upon insignificant details, due, as was said in *Plessy* v. *Ferguson, supra,* page 551, "not by anything found in the Act, but solely because the colored race choose to put that construction upon it."

To support the charge that colored passengers are not given equal treatment, appellant's brief states, pages 26–27, practically without reference to the record evidence, that only Negro passengers are confined to service at one table, behind a wooden partition, roped off like a stall until occupied, limited to serving only four at one time although all other diner seats may be vacant, required to sit at one table next to the kitchen with its clatter and traffic, and opposite the steward's office where waiters gather for supervision and change making at the cash register. These charges are almost the only factual basis for unequal treatment.

The record of evidence does not sustain these charges or permit the conclusions drawn by appellant, as to unequal treatment. The only evidence respecting the quality and kind of accommodations provided under the amended

rules, was submitted by the Southern Railroad at the second Commission hearing, October 15, 1946 (R. 197). Two officials testified, one (R. 198–215, incl.) as to the amended rule, the arrangement of dining cars, the plan for serving, describing the entire setup with pictures of the wooden partition in one car, which is planned to be installed in diners as they go to shops for repair (R. 224 A, B, C, D). The other official testified to the number of passengers served meals on all diners operating between Washington and Atlanta, during two ten-day test periods, one in 1945 and one in 1946, and submitted tabulations of the results showing the total meals served, the number each day for each car, the number of colored patrons both military and civilian, and the colored percent of the total served in each check period. The Assistant Vice-President in Charge of Transportation testified that equal facilities are furnished both races (R. 203); that the location of the steward's office was no discrimination against Negroes (R. 204); that Negroes behind the partition absolutely enjoy equal facilities as whites, that there is probably less noise and confusion at the location opposite the steward office that would be if the table reserved for colored were located in the other end or body of the car (R. 205); that the colored traveler has the same advantage as the white traveler in the diner (R. 206); that the cord arrangement at the table reserved for colored is to forbid

whites to enter the space, and is similar to the cord across the steward's office, which is to keep unauthorized persons out, that the table is exclusively reserved for colored passengers and no one else will be served there at any time; that the one table is adequate to accommodate Negro patrons at the present time and based on past experience will be adequate for the future (R. 207); that the racial segregation in dining cars conforms to the court's ruling, in the prior action (R. 208); that as a general rule all passengers are assigned space in diners but are permitted to select seats in the space for whites, if there is no reason to make assignment, just as the colored patrons may do with reference to the four seats at the table reserved for them (R. 210); that the plan for permanent partitions was because the railroad thought it would be more satisfactory to everyone, would be easier to keep clean and would not require so much repair and attention (R. 213); that in making the change passengers were considered and the partitions are believed equally comfortable and convenient for them, that comfort and convenience of colored patrons was considered, that the space assigned each race is like accommodation and that assigned colored is absolutely equal to that assigned whites (R. 214).

Appellant testified in the first hearing (R. 90–108, incl.) but made no statement as to the accommodation then supposedly reserved for col-

ored patrons. Practically all evidence at first hearing referred to the specific incident of which appellant complained, and to the method of serving rather than to the comparative quality of accommodation. The method of service has since been changed by the amended rule, and the change from curtain to permanent partition has been begun and is planned for all diners. That change does relate to comparative quality of accommodations, and, as indicated by the only record evidence, is a better accommodation and absolutely equal to that for whites. The dining car waiter testifying at the first hearing (R. 134), was cross-examined by counsel for appellant with respect to quality of accommodation in the use of curtains. He stated that curtains came down to the floor but did not in the summer make it hot or warmer for colored, because the cars were air conditioned, that he could not say that passengers served at those tables were less comfortable than those in body of car, because he never heard any complaint about that (R. 142), and, upon insistence of cross examiner, stated that the comparative comfort seemed just the same to him (R. 143). He further stated that his instructions were to serve anyone seated at his tables, the assignments made by steward, and he quite often had served white and colored together at the curtained tables (R. 145), that having been started since the war. A dining car steward tes-

tified that he had never had any complaint about the use of curtains from either race (R. 162).

The Assistant Vice President in Charge of Transportation testified that he had considered the dining car service to whites and colored, made changes from time to time to meet new conditions, and in war time overcrowding arranged for serving both races at same time and increased the seating capacity from 36 to 48 (R. 165–167). He stated the Southern operated only in Southern states, where he was raised, that he was familiar with people in that area, and that the separation of races in diner service was due to the feeling and attitude of the people, and was maintained to keep peace and order on trains. In his opinion seating of white and colored passengers together would create discord and probably end in a race riot (R. 168). The dining car rules cover operations over the entire system, and operate in the light of Jim Crow laws in every state (R. 169). He testified that traffic increase, necessitating changed methods, began about 1941 due to preparation of defense projects (R. 171).

Some of these imagined inequalities appear to be based upon an idea that dining space should be allotted to colored passengers, equal in number of tables and seats, without reference to the different percent of diners, determinable from experience. Appellant makes no attempt to offer any reason, good or bad, why eight colored diners

who might apply for dining service at one time, as very rarely occurs, should be seated at one time, where no such immediate service is demanded or expected by white passengers, who normally number several times the seats reserved for them. Based upon experience, as shown by the record evidence, there is vastly less likelihood that even a single seat in the white reserve space will be vacant, than that more than four colored will apply for service at the same time.

Of the 639 total serving periods during the two tests there were no colored civilian patrons 218 times, and only 87 times have there been as many as four—just one full table. (Only 20 times have there been more than eight, requiring three servings at the colored reserved table, all of those in the 639 serving periods of the 1946 check. In the same period white patrons numbered more than three times the seats assigned to them. In 541 of the 639 serving periods of the two tests there were more white patrons than the number of seats reserved for them, requiring two or more rounds of serving. On fifteen occasions in the 1946 test there were more than four times as many whites served as there were seats reserved for them. This shows table capacity of at least 16 for a four seater table, in four rounds of serving, during a meal period. Of the 639 serving periods in the two tests only once has there been as many as 16 colored patrons, and one other time when there were more than 12, or only twice when

the colored reserved table required more than two rounds of serving. These figures fit into the totals compiled for each test period; that for 1945 (R. 225) showing total meals served 37,615 of which only 446 were colored civilian with 36,463 whites, and 3.06 percent colored, civilian and military, with 96.94 percent white; that for 1946 (R. 237) showing 20,789 total meals served, of which 723 were to colored and 19,917 to whites, or 4.20 percent colored, civilian and military, and 95.80 percent white. The table and seat asignment is one table of four seats for colored and ten tables each of four seats for whites, a ratio of ten seats for whites to one for colored. (R. 211). On this basis colored patrons are assigned a ratio of almost three times the space assigned white patrons.

These facts and figures go to show beyond a shadow of doubt that colored dining patrons of the Southern Railway, under existing rules, are not only given equal treatment with whites, but as for space are shown a preference. There is no claim even that table equipment, service, and food, is not exactly the same as served to whites. These figures show the statement in appellant's brief, page 26, that Negroes only are limited to service of four at a time, even though "every other seat in the diner may be vacant", to be completely without support in record evidence. Appellant desperately seeks to show some prejudice

and discrimination against his race, which does not in fact exist, as ancillary to the real objective, condemnation of segregation. The brief statement infers that there are occasions when more than four Negroes apply for a meal at the same time and all but four have to stand and watch ten tables practically empty because no whites appear for the meal. On the basis of test figures nearly half the time there are no colored patrons, and more than half the time the one table cares for all colored passengers at the same time. Only imagination can believe such an occasion as appellant depicts will ever occur. Even so, the rule itself requires equal treatment, and the Commission report (R. 9), noting the very small increase in colored patrons as shown by the 1941 check, stated "Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future." On the basis of record evidence the Commission found (R. 9), "the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its *available dining car space.*" [Italics supplied.]

In the dissent of the very learned Circuit Judge member of the statutory court below, it was stated that "segregation in railroad traffic may be maintained if there are sufficient accommodations for all, but a vacant seat may not be denied to a passenger simply because of his race" (R. 261).

The dissent is based upon the finding that one table is assigned for Negroes and ten for whites, "and the result is that occasionally a member of one race is denied service which is then available to a member of the other." This seems to mean that if one colored person applies for dining service at a moment when the reserved table for four is occupied, and if there is one vacant seat at the tables reserved for whites, that table must be given to the colored passenger. That would, under the dissent conception, avoid the one colored passenger waiting for a vacant seat at his reserved table, which would be a grave preference to him and a prejudice against the white passengers who neither demand nor expect to be relieved from the wait for seats in the more overcrowded white section. It is not believed intended by the Circuit Judge, that preferential service for colored passengers is necessary to show equality of treatment. Surely he did not mean that colored passengers are not to ever wait for dining service, although it is clearly shown by the facts herein, that white passengers in greater numbers than colored normally wait at almost every meal.

To meet that dissent requirement the railroad would have to provide more than one diner for each trip, in fact to meet every possibility every train would have to carry sufficient diners for serving every passenger at the same moment. Then instead of having a single four-seater colored table vacant through one-third of all serving

periods, as presently experienced, there would be one or two vacant dining cars, expensive equipment, costly stand-by employees, and waste of transport power, merely to make certain that no colored patron should ever wait a minute to be served. This is in the face of car shortage and inability to obtain new equipment, at least until quite recently, a matter of common knowledge, and specifically testified to in this record (R. 175). The dissenting opinion, page 40, cites, as authority for its finding, *McCabe* v. *Atchison, T. & S. F. Ry Co.*, 235 U. S. 151, 162, quoting opinion statements to effect that individuals are entitled to the equal protection of law, and the essence of the constitutional right is a personal one. There the rule involved not only equality in respect to separate coach transportation, but also to furnishing of sleeping, dining, and chair cars for white but not for colored passengers. The quoted part of the *McCabe* case opinion relates solely to the *failure to furnish any sleeping, dining and chair cars, for colored passengers.* That is not the case herein where facilities of like kind and quality are furnished, and the only question is adequacy for the future. *That necessarily relates to the fair assignment of available equipment that must be divided between white and colored.* Here there is not enough equipment to provide seats for all diner patrons at one serving, consequently all passengers must some times wait to be served. That rule applies to colored and white alike. It is diffi-

cult to conceive that assignment of more tables and seats to colored and less to whites, than now assigned, is necessary to equal treatment of colored passengers. Also there is no record evidence that a single colored diner has waited service under the present rule.

The *McCabe* case opinion clearly requires the furnishing of like and equal accommodations for white and colored, whether or not the demand therefor is enough to warrant the cost, and indicates that to furnish one race and not the other, because the demand was lacking, is a violation of rights. That would be a violation of the Interstate Commerce Act, not merely human rights commonly conceded. The quotations from the *McCabe* case opinion, "Whether or not particular facilities shall be provided may be conditioned upon there being a reasonable demand therefor," clearly refers to the demands of both races, and when provided both races, indicates approval rather than disapproval of reasonable and fair division of the available equipment.

It appears that the Commission finding as to adequacy of the dining car rule for the future, rests upon a completely rational basis, and is supported by all facts of record. The only escape from this conclusion would be through imaginative assumption of facts not in the record, and complete substitution of partisan judgment, for that of the Commission, upon a subject heretofore universally held to be an exclusive administrative

function. As was said in *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286–287, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." In passing upon the adequacy of the railroad dining car rule, the separation of races under the same rule is not involved, since the Commission regards that question beyond its function to decide and in fact one which can only be decided by Congress. On the sole basis of equal treatment, the Commission has long been regarded by the courts as possessed of an informed judgment, needed for such decisions. As this Court said in *U. S.* v. *Chicago Heights Trucking Co. et al.*, 310 U. S. 344, 352–353, "And the Courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

It is solely upon this evidence that the question of possible preference, prejudice, and discrimination, as prohibited by the Interstate Commerce Act, must be resolved. This does not include the separate question of segregation *per se*, as a violation of the Act, hereinafter discussed. It is respectfully submitted that the entire record evidence permits only the one fact conclusion, that food, service and accommodations, are not only

substantially equal, but in practical effect are absolutely equal. Only a vivid imagination could discover inequality in the treatment accorded colored interstate passengers as revealed by this record. That kind of imagination is indulged in brief of appellant (R. 26) where it states that only Negroes are confined behind a wooden partition roped off like a stall, that only Negroes are limited to service of four at one time although every other seat in the car may be vacant, that only Negroes are compelled to sit at one table with its clatter and traffic, opposite the steward's office where waiters gather for supervision and change making at the cash register, all in the narrow confines of this area. Not one word of evidence justifies the assertion that Negro passengers are "confined" behind a partition "roped off like a stall," that only Negro passengers are limited to service of four at a time although "every other seat in the diner may be vacant," and to "invariably sit" at a table "with its clatter and traffic." The real evidence in this respect is stated above and compels the conclusion that the Southern Railroad, under its present rule and practice provides full equality of treatment for colored diners.

It is respectfully submitted that the decision of the lower court, in this respect, should be sustained.

(b) The dining car rule, effective March 1, 1946, if applied and enforced does not constitute a burden upon interstate commerce

It is here recognized that enforcement of a rule, practice or regulation of a carrier, which reasonably constitutes a burden upon interstate commerce, under record facts, would violate the provision of the Interstate Commerce Act, and within the authority of the Commission to forbid its continuance. Here the record evidence does not reasonably or even remotely support any conclusion that this dining car rule constitutes a burden upon interstate travelers. Appellant's brief almost abandoned all pretense of continuing this fictional contention, and only raises the question to add to the volume of claims, to effect that segregation is *per se* a violation of the Act and unconstitutional. No record evidence is cited to even indicate any such burden. The brief, page 69, admits that no shifting of seats is required of colored patrons, and bases its contention as to interstate burden upon unwarranted inferences and conclusions drawn from erroneous conception of facts, and deductions made upon misconception of principles taken from court opinions. The brief, pages 69, 70, 71, states that segregation by carrier rule is as much an interstate burden as a state statute which compels a passenger to accord his movement to local custom; that Negroes have no choice of accommodations in the section set aside for all other passengers, because no state can deprive him of a

choice of a place to live; that Negroes only are confined to use of one table, being the same as deprivation of property; that Negroes suffer humiliation and indignity when ostracized from everyone else; that the carrier is burdened with cost of removing curtains and installing partitions; that it is a carrier burden to determine race of passengers, in absence of statutory definitions, resulting in railroad liability; that uniformity in seating passengers is necessary and therefore segregation is unnecessary, and hampers choice of accommodations; and that there is waste of carrier revenues and accommodations.

These assumptions are not warranted by any record evidence and, unfortunately are largely based upon the long cultivated tragic conception that colored people are considered inferior and have been imposed upon by white people or certain classes of white people. Some 50 years ago in *Plessy* v. *Ferguson, supra,* page 551, Mr. Justice Brown properly described this character of complaint, as "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

The statement that segregation by carrier rule burdens interstate commerce as much as if done by state statute, obviously attempts to read that principle into the opinion in *Morgan* v. *Virginia,*

328 U. S. 373. That opinion is not here understood to state or even imply any such principle. That stated by the court is that a statute is invalid if it imposes a burden upon interstate commerce, and page 378, "Within the broad limits of the principle, the cases turn on their own facts." The opinion added, page 380, that the Constitution gave Congress rather than the states ultimate power to regulate commerce. Therefore, the burden upon commerce imposed by a state may be weighed by federal courts to decide whether or not the state statute is unconstitutional. This court authority under state statute was in contrast to federal regulation, as there held, since Congress, within limits of the Fifth Amendment, could burden commerce if that seemed desirable to it. In the *Morgan* case the state statute required segregation where Congress had not acted and the court, upon facts it found and stated, held the statute unconstitutional. As the Court states that case simply turned upon its own facts. Here we deal with a different state of facts.

The most notable fact difference between the *Morgan* case and that presented by this appeal, is that the former involved segregation by state statute, while in the latter segregation is under carrier rule. The *Morgan* case opinion, page 380, said, "This statute is attacked on the ground that it imposes undue burdens on interstate commerce." The state statute was held invalid solely

on the ground that it constituted a burden upon interstate commerce, page 386, "on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate commerce." The facts found to constitute such a burden are stated in the opinion, page 381, as "changes in seat designation might be made 'at any time'"; an interstate passenger must if necessary repeatedly shift seats; busses may pass through Virginia in the day or night and enforcement of the requirements for seating would be disturbing. In appraising the weight of the burden of the state statute, cumulative effects may be considered as making local regulation impractical, consideration was given to statutes of other states, different methods of identification as white or colored, with indication that such "cumulative effect" would not be applicable except as to state statutes.

The opinion makes it very clear that a uniform carrier rule, applicable over an entire system as here operating within the South, where every state maintains local segregation by statute, may provide segregation lawfully, where the state statute attempting the same thing within the state boundary, would be invalid. The difference is that the statute may be, depending upon the facts of a particular case, a burden upon commerce, whereas carrier rules apply to the entire

system, provide uniform regulation, and therefore is not a burden. The *Morgan* case recognized exclusive power of Congress to regulate interstate commerce, even to authorize a burden upon it, where that is the legislative will, except for limitation of the Fifth Amendment. Congress regulates railroads through its administrative aid, the Commission, and in this manner carrier rules are made to conform to the legislative concept. If a particular rule does not so conform Congress has the opportunity and power to compel its change through the Commission. In this way a carrier rule, unless contrary to specific Congressional regulation, carries the assumption of Congressional approval, because of non-action upon the subject, as this Court has held. This principle is clearly stated in *Chiles* v. *Chesapeake & Ohio Railway, supra,* where, in referring to the *Hall* v. *DeCuir* case, it was said, pp. 75–76:

> The court said, by Chief Justice Waite, after stating that the power of regulating interstate commerce was exclusively in Congress, "This power of regulation may be exercised without legislation as well as with it." And that, "by refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, for the government of such business." The court further said, quoting from *Welton* v. *The State of Missouri,* 91 U. S. 282,

"'that inaction [by Congress] is equivalent to a declaration that interstate commerce shall remain free and untrammeled.'" And added, "Applying that principle to the circumstances of this case, Congressional inaction left Beason [the ship owner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seem to him most for the interest of all concerned." This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress.

* * *

This legal standing of carrier rules is emphasized in the *Morgan* case opinion, pages 383, 384, where referring to the *Hall* v. *DeCuir* case, the opinion obviously approved that decision, and to clarify the *Morgan* case decision, quotes at length from the opinion of Mr. Chief Justice Waite, page 489, as follows:

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach

many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own pas engers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separated. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammeled by States lines, has been invested with the exclusive legislative power of determining what such regulations shall be.

This appeal presents a different legal and factual situation, than in the *Morgan* case, and the

same or similar facts, held a commerce burden in that case would not compel the same decision as to the carrier rule here involved. Here the facts are not only different, but clearly prove there is no burden upon commerce because of the dining car rule. The big fact in the *Morgan* case which led to annulling the state statute was the required changing of seat, sometimes at night. Appellant concedes that the carrier rule here involved does not necessitate change of seat. Other alleged facts, referred to in the brief as supporting the claim that the rule burdens commerce, relate to cost of partitions, waste of space, loss of trade, and several other factors which can only be understood as restating the personal opinion of appellant and his counsel, that they believe all segregation should be forbidden, particularly by the Commission as to that relating to interstate travel. They object to cost items, to what they term waste of space, and to the loss of business, although the carrier does not complain. There is no evidence to support such imagined burdens, and the only evidence is to the contrary. That was submitted by the carrier. It is to be supposed that the carrier knows its business, what is economically best, and what the vast majority of its patrons prefer in equipment and service. No white passengers testified on this record as to their attitude on this subject, but railway management did and stated that practice and custom for years demands segregation. If, as implied

in appellant's brief (page 35), white passengers generally do not object to mixing races in diners, it is odd that those sentiments are not communicated to railroad officials, or to law makers who could change such laws. Appellant and his counsel have offered no evidence in this record that either white or colored passengers object to separate dining service, where there is equality of treatment, and therefore is in no position to speak for either race. The fact that an occasional white patron, during crowded war conditions, took a seat at the table reserved for colored and was served with them, without protest from anyone, does not prove that the vast majority of passengers would willingly accept non-segregated service. At least experienced and informed railroad officials regard segregation as essential to their business, in order to keep peace and order between the races.

It may be that the allegation of violation of Section 1 (4) of the Act intends that as a burden upon interstate commerce. This record does not show that appellant or any other colored passenger traveled on this or any other occasion, as a part of joint or through route. Appellant was a passenger on this occasion solely over the Southern Railroad (R. 91). Even so it cannot be questioned that "reasonable facilities" for its operation, however that may be described, and the "reasonableness of the rule respecting dining car operation" is the subject of this litigation.

There is little or no record evidence upon which to base a conclusion respecting reasonable facilities, except the dining service. If the contention refers to additional cars, there is nothing to show that available space was inadequate for the traffic, although crowded, and the affirmitive proof that additional car equipment was practically impossible to obtain. This allegation of violation of specific provisions of the Act, also appears based solely upon opinion of appellant and his counsel, unsupported by evidence, that any rule to be reasonable must compel white and colored passengers to be commingled in dining car service. That is so obviously not contemplated or required by Section 1 (4), as to need no further comment.

(c) The Southern Railway dining car rule, requiring separate service for white and colored passengers, does not constitute a violation of the Interstate Commerce Act, if equal treatment is otherwise provided for each race

Questions 1 and 3 stated in brief of appellant, page 5, contend that racial segregation violates the Interstate Commerce Act, without reference to the dining car rule here involved, to the practice of the Southern Railway, or to any other specific rule, regulation, or practice of this or any other carrier. The questions as stated, the second alleges segregation to be a violation of the Fifth Amendment to the Constitution, and contrary to the National Transportation Policy and Public Policy, appear to very simply and directly contend that any and all segregation, or separation of races

under either state law, carrier regulation, or business practice, violates the Constitution of the United States and, as here immediately concerned, the Interstate Commerce Act. Record evidence herein is clear and unmistakable that equality of treatment is provided colored passengers under the dining car rule. The question of equal treatment affords only the legal opportunity to demand the court decree condemning segregation.

The first answer to this contention is that separation of races in interstate travel, under all prior judicial authority, is not a violation of the Interstate Commerce Act. On the basis of legislative and judicial history relating to the subject, showing refusal to adopt laws or to construe the Constitution and Acts of Congress as forbidding segregation in interstate commerce, it seems preposterous to expect the Interstate Commerce Commission, in this case, to overrule both courts and Congress, and now forbid that segregation by an order to the Southern Railway, effective with all carriers. The real question here is whether or not the Commission erred, as a matter of law, in declining to issue such an order. It is not, as appellant's brief would have one think, a question of personal or official views, or even judicial concept of constitutional rights, for the moment not referring to the Fifth Amendment. Jurisdiction and procedure in which the question is here presented, are special provisions of law, and limited in authority to matters that are controlled by the

Interstate Commerce Act. The broad general question of race segregation, as possible infringements of personal rights, belongs to established courts of general jurisdiction, and not to administrative arms of government. Provisions of law permit review of Commission orders, by a special court of limited jurisdiction, to determine whether or not such orders are *within the scope of statutory authority, supported by evidence, and do not affect constitutional power.* This is the principle of jurisdiction stated in *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125, 139–140:

> From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois*

Central R. Co., 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541.

The only possible constitutional question here involved relates to interstate commerce, in respect to which courts cannot invalidate federal legislation, even if that burdens the commerce, within the limits of the Fifth Amendment. *Morgan* v. *Virginia, supra,* page 380. It is obvious from the argument that appellant regards separation of races in interstate travel a violation of guarantees to colored persons under the Constitution. Some seventeen pages of the brief are devoted to the charge that segregation violates the Fifth Amendment, and the supporting arguments relate to property and political rights, threatened or damaged by provisions of state laws or private acts. No one would claim that Congress or an agency of government has power to deprive any one of rights guaranteed by the Constitution. The difficulty involved is usually whether or not any such right is in fact threatened. In discussing due process of law and the Fifth Amendment, in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, cited in appellant's brief, page 50, the court said:

> The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It

> is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will. To what principles, then, are we to resort to, ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. *We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions.* * * *

The right in question must be recognizable under the Constitution, or as established by interpretation of judicial authority. To know what, if any, force this contention of appellant is entitled to, we must first determine existence of the right claimed here that separation of races under this dining car rule, that is segregation per se, deprives appellant and other colored passengers of their constitutional rights. Very definitely no such right is guaranteed by any provision of the Constitution, extended by any Act of Congress, or recognized by any authoritative court decision. On the contrary, Congress has repeatedly, as above cited, refused to enact legislation prohibiting segregation in interstate travel, and courts have for many years unanimously held that segregation per se is not a

violation of any constitutional right, or at most refused to hold that it was a violation, either of the constitution or of the commerce act. Such legislation is pending before the present Congress. Even appellant, brief page 48, concedes that "Congress * * * has plenary control over interstate commerce, and, by the Interstate Commerce Act, has invested the Interstate Commerce Commission with primary jurisdiction to determine the lawfulness of an interstate carrier's regulations and practices." There appears to be no right of appellant or other colored people, either constitutional or otherwise recognized by law, which is violated or threatened by the dining car rule, based solely upon segregation therein prescribed.

Railroad Co. v. *Brown,* 84 U. S. 445, is a very early case in which Congress exercised its plenary power to forbid segregation, as a condition to extension of operations into Washington. That case supports no theory of appellant, but vividly points to the later repeated refusal of Congress to forbid segregation in any other interstate commerce, as authority to carriers to continue segregation rules and practices. In *Welton* v. *State of Missouri,* 91 U. S. 275, 282, it was held that "inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled." This could mean only that carriers would be authorized to operate under their own rules in respect to mat-

ters not acted upon by Congress. This is indicated later in the *Hall* v. *DeCuir, supra,* opinion, where the above language of the *Welton* case opinion is quoted, page 490, in holding a state statute prohibiting segregation invalid, as constituting a burden upon commerce, where the uniform carrier rule required segregation. Inaction of Congress upon the subject of segregation was there construed as permitting the boat operator to adopt "such reasonable rules and regulations for the disposition of passengers * * * as seemed to him most for the interest of all concerned." Obviously the Court there thought the carrier best qualified to know the interests of his patrons, and was of the opinion that segregation was not, *per se,* violative of any rights.

Plessy v. *Ferguson, supra,* established principles as to race segregation in relation to due process under the Fourteenth Amendment, power of Congress over interstate commerce, and limitations upon state authority to provide and enforce separation of races. There a state statute required railways to provide equal but separate accommodations for the white and colored races, and prohibited any person to occupy seats in coaches other than those assigned to them on account of race to which they belong, with authority to carrier officials to make such assignments. Plessy claiming seven-eighths Caucasian and one-eighth African blood, and that the mixture of

colored blood was not discernible, refused assignment of railroad officers and took a seat in the white coach, resulting in forcible ejectment and charge of violating the state statute. The opinion considered and decided almost every question relating to segregation that has been raised in the more than half century since issued, including practically every contention made herein by appellant. The chief difference in the principles stated in the *Plessy* case opinion and those here involved, is that the first concerned a state statute and the instant case a carrier rule, as in the *DeCuir* case where the conflicting carrier rule caused the Court to invalidate the state statute. In the *Plessy* case there was no conflict with carrier rule and the statute was held valid.

In holding segregation not prohibited by the Fourteenth Amendment the Court said, page 544:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. * * *

On the score of "property" rights, similar to that claimed by appellant, the opinion stated, page 548:

> While we think the enforced separation of the races, as applied to the internal

> commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, * * *

As to race determination in making assignment of space, a question raised by appellant's argument, the opinion held that carrier power to assign carries the power to determine race, in the following language, page 549:

> The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. * * *

The opinion disposes of appellant's contention, that his claimed right allegedly denied by segregation, is property, in the following language, page 549:

> It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. * * *

Further discussing possible conflict of the state statute with the Fourteenth Amendment, the court established the test of reasonableness, to decide statutory validity, in respect to which the opinion said, pages 550–551:

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in pubic conveyances is unreasonable, * * *.

And in holding the state segregation statute to be valid, the opinion concluded with a clear and powerful statement upon the general subject of race relations, the error in colored race conception of inferiority, and reasons why segregation can be discontinued only by voluntary consent of individuals and mutual appreciation by the two races. The concluding statement at pages 551–552, is:

> We consider the underlying fallacy of the plaintiff's argument to consist in the

assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and

equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

In more than half a century since *Hall* v. *DeCuir* and *Plessy* v. *Ferguson,* one sustaining a carrier rule, the other a state statute requiring segregation, courts have followed the legal reasoning and principles established by those decisions. There have been a constant, perhaps an increasing, stream of segregation cases decided by the courts, not only involving transportation but practically every other phase of life in which the two races come in contact. Many cases have found violations, in particular incidents, of various laws requiring equal treatment, but no case, although most if not all presented opportunity to so decide the question, has ever held that segregation per se is forbidden by the Constitution, by Act of Congress, or by any prior court de-

cision.[18] Every decision has emphasized the certainty of court opinion that segregation per se is not forbidden by the Constitution, or by any Act of Congress, with the added warning that only Congress could adopt such legislation, as was reiterated in the *Morgan* case, page 380, where this Court said, "The courts could not invalidate federal legislation * * * because Congress * * * has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end." Even appellant admits that Congress has the power to forbid segregation, a statement with which all informed legal opinion, including this Court, agrees. Strangely that power of Congress is not here being appealed to, but the effort is to have first, the Commission by administrative fiat, unauthorized by statute and contrary to the plainly indicated will of Congress, forbid segregation in interstate transportation, and second, having failed in that attempt, to here demand of this Court, upon review of a Commission order with its narrow jurisdictional limits, that it forbid segregation, although having clearly held that to be the exclusive function of Congress.

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[18] *Matthews* v. *Southern Railway System*, 157 F. 2d 609, may be an exception, as the court there stated in a footnote, without relevancy to issues upon which the decision is based, as to the Virginia statute requiring segregation, "That question has been settled by *Morgan* v. *Virginia*, 1946, 66 S. Ct. 1050." Of course, the Morgan case settled only the status of statutes, and did reaffirm the different principle which makes carrier rules valid.

No attempt is here made to quote from or to cite all the many segregation case decisions of this and lower courts. Those of most value herein relate to transportation and particularly to carrier rules rather than state statutes. Many decisions do relate to matters other than transportation and will, where deemed desirable, be later discussed. The following cases involving transportation affirm principles established in the *DeCuir* and *Plessy* cases.

Louisville Etc. Railway v. *Mississippi,* 133 U. S. 587, approved as lawful a state statute requiring carriers to provide separate equal accommodations for colored and white passengers, where the carrier was charged with failure or refusal to provide such accommodations. That case involved only intrastate passengers, the state court holding, "We have nothing whatever to do with it as a regulation of interstate commerce," the state court opinion being further quoted with approval, as stating, "But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, *does encroach upon the exclusive power of Congress.*" [Italics supplied.] In the similar case of *Chesapeake and Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388, a carrier charged with violation of a state statute requiring separate but equal accommodations for white and colored intrastate passengers, because of failure to provide such accommodations, the statute

was held valid. Obviously in both these cases the statutes might have been invalidated by decision that segregation *per se* violates some constitutional right.

Chiles v. *Chesapeake & Ohio Ry.*, 218 U. S. 71, involved a carrier rule providing for separation of white and colored passengers, where an interstate colored passenger from Washington to Lexington, Ky.; on first-class ticket, was removed under protest from car exclusively assigned whites, to another of equal quality exclusively assigned to colored passengers. The colored passenger brought suit for damages against the railroad in the state court, tried before jury with verdict against him and judgment for railroad. The court and jury found that accommodations were of substantial equal quality. The Court opinion upon appeal, page 74, stated the issues as resting upon "the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void." The state statute was held inapplicable to interstate passengers, conforming to decision in *C. & O. Ry.* v. *Kentucky*. Drawing the distinction between state statutes and carrier rules requiring segregation, the court said, page 75:

> The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are

> dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant.

In referring to language of the *DeCuir* opinion as quoted from *Welton* v. *Missouri, supra,* to the effect that inaction of Congress left interstate commerce free, and permitted carriers to adopt reasonable rules for disposition of passengers, the court stated, page 76:

> This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress.

In referring to the opinion in *Plessy* v. *Ferguson,* with particular reference to constitutional rights involved in segregation, the Court said, page 77:

> It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, *"the established usages, customs and traditions of the people" and the "promotion of their comfort and the preservation of the public peace and good order,"* this must also be the test of the reasonableness

> of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.* * * * [Italics supplied.]

And in conclusion the Court stated, page 77:

> The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. * * *

That Court statement was made almost forty years ago and shows even then, the well established principle that segregation *per se* is not a violation of the Constitution and, in absence of congressional action, leaves the carrier free to apply its rules with such requirements to interstate passengers.

McCabe v. *Atchison, Topeka & Sante Fe Railway Company*, 235 U. S. 151, decided in 1914, long after adoption of section of the Commerce Act, was an action in federal court to restrain several railroads from making any distinction in service on account of race, and to enjoin compliance with state statute requiring separation of races, in coach travel, but permitting sleeping, dining, and chair cars exclusively for whites. The opinion first noted that the carriers "provide no

similar accommodations for Negroes", and said, page 161, "The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. * * * "This argument with respect to volume of traffic seems to us to be without merit." Appellant here, brief page 56, vainly contends that this and other cases did not decide the issue as to segregation. The question of validity of segregation, even under a state statute, was clearly presented in this case and a decision upon appeal that segregation *per se* is unlawful would have invalidated the statute. The opinion plainly indicated adherence to prior decisions on the subject and stated, "but, if facilities are provided, *substantial equality of treatment of persons traveling under like conditions cannot be refused.*" [Italics supplied.] There could be no purpose or understanding of this statement unless it contemplated "separate" facilities. And to make this clear it was added, page 162, "if he is denied by a common carrier, * * * a facility or convenience * * * which *under substantially the same circumstances* is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." [Italics supplied.] There could be no meaning in the use of the phrases "substantial equality" and "substantially the same circumstances", except as that relates to separate service, recognized as a valid requirement under carrier rule, as to inter-

state, and under state statute, as to intrastate passengers.

Mitchell v. *United States*, 313 U. S. 80, decided 1941, involved a procedure practically as that herein, with the difference that the carrier action was under state statutes, not its own rule, that the Commission did not there find discrimination and prejudice against complainant in the incident, as was found herein, and the change in separate coach facility, obviously not assurance of equal treatment, whereas here the change of rule conclusively assures equal treatment. The opinion carefully states the issues there presented, that the Commission had authority to decide whether or not a discrimination by a carrier is unjust and unlawful, under particular facts of the case, that the District Court had jurisdiction to review the Commission action, the review question being whether or not the action accorded with applicable law, that facts of case were determinative of the discrimination charged, that "The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment", and that denial of equality of accommodations because of race would be an invasion of fundamental rights. Clearly the issue of segregation *per se* was before the court, and if deemed by the Court unlawful, a decision so holding would have avoided meticulous consideration

of state statutes, carrier practices, discrimination and prejudice involved, and facts relating thereto. Why devote so much effort to clarifying differences between individual and group rights, if segregation itself, violates the Constitution or the Interstate Commerce Act? Why state so deliberately that the question was "one of equality of treatment", not one of segragation, when there could have been no question without the segregation? The basis of the decision was that colored passengers were not given accommodations equal to white passengers, page 96, that inequality persists with respect to dining car and observation-parlor car accommodations, and finally, page 97, that, "It is enough that discrimination shown was palpably unjust and forbidden by the Act." It is respectfully submitted that this opinion conforms to previous decisions and supports the lower court holding herein that "segregation * * * is not *per se* forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress".

And the last, perhaps the most important case, *Morgan* v. *Virginia,* has been discussed to some extent above. As here believed, that opinion carefully and fully conforms to principles that have been applied by this Court since the *DeCuir* and *Plessy* decisions. The opinion leaves no doubt that the decision rendered is based upon the court finding, that the state statute imposed a burden upon interstate commerce. Nothing in the opin-

ion justifies a conclusion that the court there decided segregation *per se* to be unlawful for any reason. On the contrary the opinion carefully distinguished between the burden found under state statute, and the lawfulness of carrier rules requiring segregation. In so doing the opinion noted the ultimate power of Congress to regulate commerce, and to burden that commerce if that seemed to it desirable. The citation and long quotation, with approval, from the *DeCuir* case opinion, appears to remove all question that this court in the *Morgan* case, considered segregation under reasonable carrier rules, in the absence of contrary action by Congress, where there is no inequality of treatment and no burden upon interstate commerce, as a valid and lawful requirement. If that is not what the court intended it must be recognized that a really perfect legal opportunity was overlooked to declare segregation per se, a violation of the Interstate Commerce Act or of the Constitution, if that by any chance was an intended implication.

Insofar as can be determined every court decision upon the subject, whatever the segregation relates to, since the *Morgan* case decision by this Court, has interpreted that opinion as adhering to the long established principle of the *DeCuir* and *Plessy* cases, that segregation *per se* is not forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, and that, in the absence of action to the

contrary by Congress, carriers may lawfully provide for segregation under reasonable rules provided there is equality of treatment. A number of these cases relate to transportation.

Simmons v. *Atlantic Greyhound Corp.*, W. Dist., Virginia, decided December 30, 1947, 75 F. Supp. 166, squarely presents the question of lawfulness of a carrier rule requiring segregation of an interstate passenger, where there was no discrimination involved, and issues were practically resolved upon refusal of plaintiff to be seated in the section of the bus assigned to colored people, claimed to be a violation of constitutional rights under the Fourteenth Amendment, Section 1, and of civil rights under Title 8 U. S. C. A., Section 43. The court held, page 169, that no cause of action was shown as to claimed violation of constitutional and statutory civil rights, under court authorities, and said:

> The Supreme Court has consistently held that there is no infraction of the Fourteenth Amendment by a requirement for separate accommodations for white and colored persons on public carriers so long as the accommodations are equal. See *Plessy* v. *Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; and *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160, 35 S. Ct. 69, 59 L. Ed. 169.

The opinion stated that the case was apparently inspired by *Morgan* v. *Virginia*, *supra*, and that plaintiff sought to bring his case within those principles. Speaking of the *Morgan* case, page

170, the Court said, "There is nothing in it which overrules, or even discusses, the principles laid down in *Plessy* v. *Ferguson, supra,* and in *McCabe* v. *Atchison, T. & S. F. Ry. Co., supra,* and these cases are, I take it, still authority for what was decided in them." The opinion followed with the statement, page 173:

> The plaintiff appears to understand the decision in the Morgan case as being a judicial determination that any attempted separation of white and colored persons on a public carrier is illegal as applied to an interstate passenger, no matter by what authority or under what circumstances the attempt is made. I do not so construe it. I do not understand that the court in that case, or in the *DeCuir* case, asserted or assumed the power to impose regulations governing interstate traffic, but only that it denied the right of a state to interfere with such commerce. The distinction becomes important when, as in the instant case, we are dealing, not with a state statute but with the effect of a custom or rule adopted by the carrier in connection with the operation of its business. * * *

The Court held that "The right of a common carrier to adopt and enforce reasonable regulations governing the operations of its business has always existed." In approving reasonableness of the carrier rule and lawfulness of segregation thereunder, opinion testimony of three Presidents of bus companies and of public offi-

cials of two states was noted, to the effect that separation of white and colored bus passengers within the territory, was desirable and in the interest of both races. With reference to authority of Congress, Courts, and the Commission to decide the right of carriers to separate races, the opinion said, page 176:

> It must be repeated and steadily borne in mind that the power to regulate interstate commerce is vested in Congress. This power Congress has, within certain limits, delegated to the Interstate Commerce Commission. To what limits the powers of this latter body extend need not be inquired into. The fact remains that neither Congress nor any agency created by it has sought to impose any regulation dealing with the separation of passengers in interstate commerce. The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt and that it considered that rules providing for the seg-

> regation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurping the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the exercise of power specifically and solely entrusted to it, has refused to lay down.

Solomon v. *Pennsylvania R. Co., et al.*, 79 F. Supp. 449, Dist. of New York, decided July 22, 1948, involved a carrier rule requiring separation of races. Traveling upon a coach ticket from New York to Florida, plaintiff was compelled by carrier officers to move into the all colored coach. Defense was based upon the right to require separate accommodations of equal quality for white and colored passengers, and the motion of plaintiff to strike that defense was denied. This case raised the question of lawfulness of segregation *per se*, under reasonable carrier rules, and the opinion of the Court very clearly holds that the *Morgan* case decision did not decide that segregation *per se* under a carrier rule is invalid. That Court opinion fully sets forth its position in respect to the *Morgan* case, as stated page 450:

The plaintiff's position seems to be that the cases of *Morgan* v. *Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574, and *Mattews, et al.* v. *Southern Railway System*, 81 U. S. App. D. C. 263, 157 F. 2d 609, which hold that state segregation statutes covering both interstate and intrastate motor carriers or railroad carriers are invalid because they burden interstate commerce contrary to Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States, which makes a railroad company's segregation rule per se invalid. *Morgan* v. *Virginia, supra,* deals with a state statute and specifically recognized the right of a carrier to make reasonable rules and regulations. 328 U. S. 373, 377n12, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574. This case reiterated the controlling effect of *Chiles* v. *Chesapeake & Ohio Railroad*, 218 U. S. 71, 30 S. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980, which held that a railroad could make reasonable rules and regulations as to the segregation of colored and white passengers in interstate travel.

Day v. *Atlantic Greyhound Corp.*, Court of Appeals, Fourth Circuit, decided December 7, 1948, 171 F. 2d 59, affirmed the district court judgment for defendant. The action, as described in the court opinion, page 60, was for personal damages because of enforcement of carrier rule requiring segregation of white and colored passengers. Reasonableness of the regulation was decided by jury verdict for defendant.

The opinion of the learned Circuit Judge Soper fully and ably states the question presented and decided with particular reference to the *Morgan* case decision, as follows, page 60:

> The most important legal question on this appeal is raised by the contention of the plaintiff that any rule of a common carrier which imposes racial segregation upon its passengers not only contravenes the principles of the common law, but violates the Fourteenth Amendment of the Federal Constitution. This question, however, is not open to debate in this court. It is foreclosed by binding decisions of the Supreme Court which hold that an interstate carrier has a right to establish rules and regulations which require white and colored passengers to occupy separate accommodations provided there is no discrimination in the arrangement. * * * In *Morgan* v. *Virginia*, for example, it was held that a Virginia statute which requires motor carriers to allocate seats to white and colored passengers so as to separate the races, and requires passengers, if necessary, to change their seats repeatedly in order to comply with the allocation, imposes an undue burden on interstate commerce and therefore violates Article 1, Sec. 8, Cl. 3 of the Federal Constitution. Nevertheless, in this very case the court pointed out that it was dealing with a state statute and not with a regulation of the carrier;

and the court referred specifically to its earlier decision in *Chiles* v. *Chesapeake & Ohio R. Co., supra,* in the following language, 328 U. S. 373, 377, Note 12, 66 S. Ct. 1050, 1053, 90 L. Ed. 1317, 165 A. L. R. 574: "When passing upon a rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make.' *Chiles* v. *Chesapeake & Ohio R. Co.,* 218 U. S. 71, 75, 30 S. Ct. 667, 668, 54 L. Ed. 936, 20 Ann. Cas. 980." Since the Chiles case expressly sustained the power of an interstate carrier to issue a segregation regulation, provided that it is not discriminatory, our inquiry must be limited to the nature of the regulation enforced in the pending case, and we may not inquire whether the segregation of the races in public vehicles is in itself inherently discriminatory.

And in *Pridgen* v. *Carolina Coach Co.,* 47 S. E. 2d 609, decided May 5, 1948, the Supreme Court of North Carolina sustained as lawful a bus carrier rule requiring separation of white and colored passengers, where equal accommodations were provided. This case, as did the three cases discussed immediately above, presented the exact question of lawfulness of segregation *per se* under carrier rules, and in each the Court held that the decision of this Court in *Morgan* case, had not

changed the established court principle, that such rules are valid where there is equality of service. The following quotations from the North Carolina Supreme Court opinion vividly express this view, pages 611–612:

> Moreover, we know of nothing that makes segregation *per se* unconstitutional or violative of any act of Congress. The discrimination forbidden by the Interstate Commerce Act, 49 U. S. C. A. Sec. 1 et seq., "is not one of segregation, but one of equality of treatment." *Mitchell* v. *United States,* 313 U. S. 80, * * * the Supreme Court of the United States held in effect that in the absence of legislation by Congress, a common carrier is at liberty to adopt such reasonable rules and regulations for the separation of the white and Negro races as seems to it to be for the best interest of all concerned. * * * Surely segregation, in the absence of any discrimination in favor of or against the white or Negro race, does not constitute a burden on interstate commerce. * * * Evidently the plaintiff is under the impression that the recent decision of the Supreme Court of the United States, in *Morgan* v. *Virgina, supra,* is a judicial determination that any law enacted by a State or any regulation adopted by a common carrier, which requires the separation of the white and Negro races, in public conveyances, is illegal and may be ignored by interstate passengers. We do not so interpret the opin-

> ion. * * * Furthermore, we know of no decision of the Supreme Court of the United States which holds that an interstate motor carrier may not adopt rules and regulations reserving full control and discretion as to the seating of passengers, and may not further reserve the right to require passengers to change seats at any time during a trip. *Simmons* v. *Atlantic Greyhound Corporation, supra.*

In addition to the above court authorities, the Commission has decided several segregation cases, in which interpretation of the Morgan case decision has been applied similar to those of the court opinions.

Stamps and Powell v. *Louisville & N. R. R. Co.*, 269 I. C. C. 789 (1948), involved a different carrier dining car rule than that here involved, which was adopted after the incident therein and after the first *Henderson* court case decision herein. That rule provided separation by curtains behind the first two tables, one on each side of aisle, next kitchen end of car, with those two tables exclusively assigned colored, and remaining tables in car assigned to white passengers. Complainants Stamps and Powell contended that segregation of interstate passengers is *per se* a violation of the Constitution and of Sections 2 and 3 of the Act. The Commission found in respect to this contention as follows, page 794:

> Complainants contend that racial segregation of interstate passengers is per se a

violation of the Constitution and of sections 2 and 3 of the act. The Supreme Court repeatedly has held that State statutes requiring the segregation of Negro and white intrastate passengers are not invalid or unconstitutional per se. *Plessy* v. *Ferguson*, 163, U. S. 537; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151; *Chesapeake & O. Ry. Co.* v. *Kentucky*, 179 U. S. 388; *Louisville N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587. And segregation by State law is not per se an abridgement of any constitutional right secured to the citizen. *Henderson* v. *United States, supra.* In *Hall* v. *DeCuir*, 95 U. S. 485, a State statute prohibiting segregation of interstate passengers in steamships, and in *Morgan* v. *Virginia*, 328 U. S. 373, following *Hall* v. *DeCuir, supra,* a State statute requiring segregation of interstate passengers in motor-busses, were held to be invalid as imposing a burden on interstate commerce. In none of the cases cited, nor any other case that has been called to our attention, did the Court hold segregation to be unconstitutional per se or violative of any act of Congress. In *Mitchell* v. *United States*, 313 U. S. 80, the Court impliedly found segregation to be not unlawful insofar as the Interstate Commerce Act is concerned, saying: "The question whether this was a discrimination forbidden by the Interstate Commerce Act is not one of segregation, but one of equality of treatment."

In recognition of power of Congress to enact laws regulating interstate commerce, and to fix the limits of Commission authority, vested with responsibility to apply those laws, the *Stamps* report said, page 794:

> The Commission, within a few months after its organization, expressed the conclusion that the separation of white and Negro passengers paying the same fare is not in violation of section 3 of the act if cars and conditions equal in all respects are furnished to both and the same care and protection of passengers is observed. *Councill* v. *Western & A. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. Co.*, 1 I. C. C. 428. It has adhered to that conclusion consistently. Although the question has been constantly and persistently agitated before the public and the Congress for many years, the Congress has done nothing to indicate that it did not concur in the Commission's interpretation of the act.

In distinguishing the Morgan case from *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352 (1947), the Commission interpreted the basis of the decision to be the burden upon interstate commerce found to result from the state statute, held to be invalid, while the *Mays* case concerned a carrier rule involving only the question of equal treatment, with reference to which the report said, page 361:

> That decision is not here in point, because circumstances relating to services afforded passengers in dining cars are substantially

different from those appertaining to transportation in motor vehicles such as those involved in the *Morgan* case. The act does not prohibit segregation of passengers based on difference in race, but it does prohibit inequality of treatment. There is, however, no justification in the instant proceeding for a finding that equality of treatment can result only from discontinuance of regulations providing for segregation in dining cars.

Considering for the moment only the question of whether or not segregation *per se* violates any provision of the Interstate Commerce Act, it seems very certain that the decision by this Court in the *Morgan* case was not intended and did not in reality change, annul, or amend principles relating to the subject, established in previous decisions. And if segregation *per se* is a violation of any Act of Congress or provision of the Constitution, it has not been so held by any court, and the *Morgan* case opinion plainly provides authority for that statement. All subordinate courts, in deciding interstate transportation cases, have so construed the *Morgan* case since that decision. And since the *Morgan* case this Court has continued to adhere, in cases involving other segregation matters, to the 75-year-old principle that segregation *per se* violates no federal law or constitutional provision.

Under the facts of this case it is not believed possible to find any substantial difference in the

treatment of colored and white passengers under current dining-car rules. The statement of facts, issues, and arguments thereon in appellant's brief, seriously suggest the conclusion that, offenses under the provisions of the Interstate Commerce Act, and equal treatment of colored and white passengers under separate service of carrier rules, is not deemed important either as a fact or legal question, but that practically the only question of importance, is to have this Court declare segregation *per se* unlawful. Here the attempt is to have that unlawfulness based upon the claimed error of the Interstate Commerce Commission in its finding that segregation is neither forbidden nor required by the Commerce Act, and as presented by appeal from the decree of a statutory court, with only limited jurisdiction, in a review of the Commission action. This appeal presents only questions within the statutory authority of the Commission to decide, which appear to require review as in all such cases, without reference to the broad general questions of legal and constitutional matters, which can only be decided by the unlimited jurisdiction of courts other than administrative agencies. The special courts, established by statute to review administrative decisions, have only the jurisdiction conferred by the creating act.

Questions of violations of the Act and equality of treatment require decisions under the facts of each case, a function exclusively for administra-

tive action, here the Commission. As long recognized by this Court, review of such fact decision is very limited, and where there is a rational basis for the administrative judgment, courts do not interfere."[19]

In here insisting that this Court decide segregation *per se* unlawful, as a violation of the Interstate Commerce Act, upon the basis of the Commission finding that it is not required or prohibited by that Act, appellant in reality seeks a decision condemning segregation as prohibited by the Constitution in all phases of human relations, not merely as to interstate commerce. It is not a question of Supreme Court jurisdiction, but one of Commission authority and jurisdiction, and that of the special statutory court upon review, not the District Court with general jurisdiction. Particularly in interstate commerce, as here the only segregation involved, it is a question of what is or is not prohibited by the Commerce Act. That as held by this Court in a number of cases, and particularly indicated in the Morgan case opinion, is a question exclusively for Congress to decide. What appellant here insists upon is, in effect, that the Interstate Commerce Act be amended by this Court, even though Congress has repeatedly refused to enact that amendment, which has often been held to be approval

[19] *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282.

of segregation in interstate commerce by carrier rule.

The carrier rule here involved is believed to be entirely reasonable, to provide with certainty equal treatment for colored and white passengers, as far as that is humanly possible, within the limits of equipment available or within the reasonable capacity of the carrier to provide. Segregation *per se,* as held by the Commission, is not specifically required or prohibited by the Act, and can be found a violation only by interpretation. The Commission has not herein or elsewhere either sanctioned, approved, or disapproved segregation, as a public policy, as a human rights policy, as a legislative policy, or as any other kind of policy. It has only decided that, as required by carrier rules, it is not a violation of the existing Interstate Commerce Act, or otherwise unlawful under its interpretation of judicial decisions. There seems to be utterly no factual basis, and no recognizable statutory or judicial direction or requirement which would warrant the Commission to declare segregation *per se,* as presented herein, to be a violation of the Interstate Commerce Act or otherwise unlawful. Appellant here misconceives the authority, function and procedure of the Interstate Commerce Commission, and court review of its orders, even to a greater extent than was said in overruling the lower court in *United States* v. *Pierce Auto Lines, Inc., et al.,* 327 U. S. 515, 535–536, as follows:

> We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that "* * * the courts must in a litigated case, be the arbiters of the paramount public interest." This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requiren ents of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

II

The Constitution and separation of races in interstate transportation

The Constitution, like the Interstate Commerce Act, neither approves nor disapproves racial or any other kind of segregation, in interstate commerce or otherwise. It is important that the Constitution does not forbid segregation *per se,* as has been held by the courts for many years, and par-

ticularly by the lower court herein, first *Henderson* case opinion, page 914. Also important is the Constitutional power over interstate commerce, vested by the Commerce Clause, and recognized as exclusive legislative authority. Therefore the conclusion is compelling that, the only method and procedure by which segregation *per se* can legally be forbidden in interstate transportation, is to either amend the Constitution by specific provision, in the manner and by the procedure therein provided, or by legislative enactment specifically prohibiting it in interstate commerce. Such a constitutional amendment has never been attempted, and if sought would doubtless apply to every phase of human affairs, not merely to interstate commerce. Legislative prohibition of segregation in interstate commerce has been repeatedly urged upon Congress, numerous bills have been offered and considered, and two are now pending before the 81st Congress. For years Congress has refused to enact this legislation, and courts have construed this non-action as approval of carrier authority to require segregation under reasonable rules. In respect to other relations segregation has been considered as permitted by proper authority, where there is equality of treatment.

We may here consider as a constitutional question, only the possible legal error of the Commission in refusing to declare the carrier dining car rule to be a violation, solely upon the ground that

segregation is required. The Constitution may be lawfully amended only by the will of the people. Forbidding segregation is possible, through the will of people without amending the Constitution, either by Act of Congress, certainly as to interstate commerce and perhaps in some other relationships, or by exercise of state reserved power, which can do so with respect to all kinds of segregation, insofar as each state is concerned. The federal constitution, as to the federal government, and the several state constitutions, as to each state, are expressions of the will of the people as to basic power, constituted authority, and fundamental rights and freedoms. Under constitutions, legislative authority provides constant opportunity for expression of the will of people, as to how government may operate, and the privileges and restraints that may be applied. These are the methods by which a people under a democracy are constantly and quickly enabled to translate their customs, practices, and ambitions into the law that controls, and to change basic government only after long and careful consideration of the necessity or desirability thereof, judicial power is established to restrain legislative and administrative action to constitutional limits of authority and to protect individual rights under constitution and statute.

Within this basic framework of our democracy our people are controlled by laws, enacted by a majority expression in free elections. In this

manner the constantly changing statutory laws represent the current will of a majority of our people, and is a protection of the majority against those who would usurp power or enact laws contrary thereto. Under this governmental arrangement some courts are given jurisdiction to decide any legal controversy, some by legislative authority, while others, as here a statutory court to review administrative action, are limited to decisions upon matters vested by the creating statute. Administrative bodies are vested only with limited authority, within limits prescribed by statute.

It is the province and authority of this judicial structure of government, to each restrain itself to the exercise of power to that which has been assigned by the Constitution and legislature. This court has the ultimate judicial power to decide what is within the jurisdiction of subordinate courts, quasi-judicial administrative bodies, and even within its own constitutional power. It is a remarkable testimonial to judicial judgment, reason and devotion to fundamental principles of our government, that the balances and checks which were intended by the founding fathers to perpetuate our form of democracy, have been so carefully protected and preserved by courts possessed of such great power. This court ideal so long observed was recently and impressively restated by Mr. Justice Douglas, with respect to administrati action possibly beyond the statutory authority, in a dissent to the opinion in

Interstate Commerce Commission v. *Parker Motor Freight et al.*, 326 U. S. 60, 75, where he said:

> Whether it is wise policy for the railroads to enter and dominate this field is neither for us nor the Commission to decide. If the railroads are to be given this preferred treatment when they seek to substitute motor carrier service for rail service, the authority should come from Congress, not this Court. Meanwhile, we should be alert to see to it that administrative discretion does not become the vehicle for reshaping the laws which Congress writes.

This Court is fully aware, without citation to particular cases, of the many instances where orders of this Commission have been annulled, on the ground of exceeding its authority. The above attempt to describe the functions of government and its agencies, is intended only to emphasize the extremely narrow limits in which this Commission may act lawfully. To exceed its authority deliberately would doubtless result in judicial and legislative condemnation. The constitutional question here urged by appellant, is that the Commission erred in refusing to forbid segregation by carrier rules in interstate commerce. That is precisely the power and authority which all courts, including the supreme power of this Court, have refused to do in all the years since the emancipation of slaves. That is precisely what Congress has repeatedly refused to do, even with changes

of personnel following many elections. That is the reason no such arrogant assumption of power could be lawfully exercised by this Commission. It would be awesome and dangerous to basic processes of government were such a question to be so decided by this or any administrative agency. The recent judicial statement of Mr. Justice Douglas, above quoted, is taken as a distinct warning that this Commission must not become the vehicle for reshaping acts of Congress, and surely not to amend the Constitution, as has been repeatedly interpreted by judicial authority.

The Commission does not intend any approval or disapproval of racial segregation in transportation or elsewhere. That is appropriate for private citizens only at free elections, and to legislators in considering proposed laws. That would not be appropriate, and as here contended, lawful for this Commission, unless and until Congress amends the existing Commerce Act whereby all its authority is derived. This is not to say that the Commission is without authority to declare carrier rules and actions invalid, where constitutional rights are conceivably violated thereby. This is plainly not such a case.

It seems proper for this Commission to restrain its action to existing law, under the Constitution, as interpreted by this Court, and under statutes enacted by Congress. It is not believed appropriate to attempt unauthorized changes in the existing law, even though demanded by powerful

organizations or political expediency. We must agree with the statement of the distinguished Special Assistant Attorney General, in his argument to the lower court (R. 26), supporting the Commission action herein, where he stated: "I do not think the case should be decided upon any principles of moral philosophy or political evangelism, or upon these basic doctrines of liberty and free association and the other things which, very eloquently and very properly, my adversary has rested his case on."

With all this in mind the propriety of discussing any phase of the constitutional question urged by appellant is doubted. Only because silence may be taken as concession of the question urged by appellant, is it herein undertaken to any extent.

On that subject we can only submit the interpretations of this Court, expressed in almost innumerable opinions, and as here particularly concerned in cases above cited. It is believed that repeated opinions in cases relating to other subjects, have an important bearing upon the general question as to whether segregation *per se* violates any constitutional right. On the basis of all such opinions it is impossible to conceive a contrary decision in this case, where the limited authority of this Commission regulates interstate commerce, as directed by Congress, which holds exclusive constitutional power over the subject, as consistently held by this Court.

The abnormal, unnatural, and strained arguments of appellant make it difficult to determine the precise legal reasons or basis for the claim that segregation is a violation of some constitutional right. The effort of appellant to secure prohibition of segregation in all affairs and relationships of our people, has led to frenzied statements and claims completely foreign to usual form and substance of legal arguments. Brief subheads astound with arguments that segregation is unconstitutional because "The action of the Commission and Court is contrary to the public policy of the United States", page 74, and "Segregation on account of race is contrary to the philosophy of our government", page 78. The argument reaches into unchartered fields of government experiment and quotes from sources unrelated to judicial authority. And to support these far-fetched legal comprehensions, in the absence of record evidence, addition thereto is attempted contrary to all legal precedent, by including in the appendix, pages 94–106, inclusive, a series of letters addressed to one of counsel for appellant, commending the effort to abolish segregation, stating opinions on the subject, and in some instances relating personal experiences. In one instance the quotation is patently taken from fiction. The purpose in this part of the appendix is not understood, unless appellant and his counsel consider court proceedings the same as legislative hearings.

Legal unreality appears in such brief statements as "American people who want to practice christianity if not hampered in that practice by their government", page 90: "What we seek is not justice under law as it is. What we seek is justice to which law in its making should conform", pages 87–88; "The Emancipation Proclamation broke the legal bond of slavery but not the social one", page 83; "Negroes are American citizens; this Court should take heed what it does to them", page 76; and the following quotation from the appendix letter of the Head, Department of History, Howard University, page 96, "by training and temperament it is impossible for him (the author) to be a communist but if there were anyone thing in American society that would lead him to communism, it is the impact of the insult to his dignity as an individual arising from the dining car regulations."

These somewhat startling arguments, and statements are referred to because they evidently form the major reasons upon which appellant and his counsel base their claims of constitutional violation herein. This could not be, under any reasonable legal comprehension, an argument as to constitutionality of anything. These matters relate to human relations, customs, practices, and instincts as deep as life itself and as long standing as time. What appellant urges relates to something even deeper than law, government, and the

Constitution, as was stated by Mr. Justice Brown in *Plessy* v. *Ferguson, supra,* pages 551–552;

> The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. * * * Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Appellant claims that the public, other than Negroes, are interested in removing segregation. If that be so, there should be no need to seek unauthorized amendment of the Interstate Commerce Act by the Commission since Congress, elected by the public, has exclusive authority to forbid segregation in interstate commerce. Forced commingling of races against the majority will can lead only to disaster. Perhaps the warning of Mr. Justice Brown, out of the distant past, is as forceful today as when issued. Events since that time seem to prove that racial ambitions here urged can be attained only as a result of "natural affinities", a mutual appreciation of

the merit of each and voluntary consent of individuals.

Respecting purely legalistic interpretation of the Constitution, to determine its mandate, if any, upon the subject of segregation, there are numerous impressive judicial guides, clearly indicating that segregation has never been considered at any time, in any part of the country, to be forbidden by the Constitution. The authorities above cited support this statement in respect to interstate commerce. Recent decisions of this Court relating to relationships other than transportation, fully support the Commission position, that segregation *per se* is not forbidden by the Constitution. Perhaps the longest and most vigorous controversy over segregation has been in respect to schools.

The New York case of *People* v. *Gallagher,* decided in 1883, 45 Amn. R. 232, sustained segregated schools of equal quality in Brooklyn, under authority of its Board of Education, acting under state laws. The opinion includes a full discussion of prior court and statutory action upon the subject. Separation of races in Boston as early as 1849 was noted in *Roberts* v. *City of Boston,* 5 Cush. 198. Notice was taken, page 241, of establishment by Congress in 1862, of exclusive schools for the colored race in the District of Columbia. A number of cases from other states, largely states of the North, are cited as sustaining constitutionality of separation of races

in schools, page 243.[20] The reasons for segregation and the attitude of people as it then existed, could be no more clearly stated than was done by this opinion of the New York court, pages 237–238 and 240:

> In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result. *Roberts* v. *City of Boston*, 5 Cush. 198.
>
> A natural distinction exists between these races which was not created neither can it be abrogated by law; and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights. * * * Recent movements on the part of the colored people of the south, through their most intelligent leaders, to secure Federal sanction to the separation of the two races,

[20] *State, ex rel. Garnes* v. *McCann*, 21 Ohio St. 210; *Cory* v. *Carter*, 48 Ind. 327; *Ward* v. *Flood*, 48 Cal. 36; *State* v. *Duffy*, 7 Nev. 342.

so far as the same is compatible with their joint occupation of the same geographical territory, afford strong evidence of the wishes and opinions of that people as to the methods which in their judgments will conduce most beneficially to their welfare and improvement.

In *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528, (1899) the opinion by Mr. Justice Harlan, who dissented in the *Plessy* case, held that race segregation in public schools under state statute was not prohibited by the Fourteenth Amendment. *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), sustained as lawful refusal to admit a Chinese to white public school, under state statute requiring separate schools for white and colored students. Speaking of the state court decision holding the state statute lawful, the opinion of Mr. Chief Justice Taft said, page 87, "The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." State courts have held that separation of races in public schools is not forbidden by the Constitution.[21]

A leading recent school segregation case decided by this Court is *Missouri Ex Rel. Gaines* v. *Canada,* 305 U. S. 337 (1938). The question there arose over refusal of Missouri University to

[21] *People* v. *School Board of Borough of Queens,* 161 N. Y. 598, 56 N. E. 81 (1900); *State ex rel. Weaver* v. *Board of Trustees of Ohio State U.,* 126 Ohio St. 290, 185 N. E. 196 (1933).

admit Gaines, a Negro, to its law school, and mandamus was sought to compel the University to admit him. Denial of admission to the University was held a violation of rights to equal school opportunity where no separate school was available for Negroes. The opinion by Mr. Chief Justice Hughes notes recognition by state court of the obligation to provide educational opportunity for Negroes substantially equal to those provided whites, stating, page 344, "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." And to make it clear that segregation itself is not unlawful the opinion later said, page 349, "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State."

The *Gaines* case is important in plainly stating the position of this Court, adhered to over many years, to the effect that separation of races in various activities is lawful and does not violate constitutional rights, provided equality of treatment is afforded both races. *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), was decided per curiam upon authority of the *Gaines* case.

Other cases in numbers too great to permit mention or discussion deal with segregation in many affairs of life, which have little or no appli-

cation here. The District Court opinion below considered and interpreted all decisions of this Court, since the prior District Court case herein, which were deemed to be pertinent. The *Morgan* case was distinguished from the instant case, as shown above. The *Bob-Lo Excursion Co.* v. *Michigan* case, 333 U. S. 28, was interpreted as only upholding a Michigan statute prohibiting segregation in local transportation, and not pertinent herein, pages 38–39. The deed covenant cases[22] involving prohibited sales of realty to Negroes was held to "have no relation, directly or indirectly, to issues of the present case. Those cases do not hold that race segregation in respect to deed covenants is forbidden."

The one outstanding constitutional fact established under the above-cited authorities is that segregation is not forbidden. It is always inequality of treatment which leads to invalidation of state statute, carrier rule, and other authority requiring separation of races. Despite repeated adherence to this principle over many years, appellant here again asks this Court to apply a different interpretation to the Constitution, and decide this case completely contrary to all prior decisions. To do that herein would be to set aside the power of Congress, previously considered exclusive, and to require Commission action con-

[22] *Shelley et ux* v. *Kraemer et ux*, and *McGhee et ux* v. *Sipes et al.*, 334 U. S. 1; *Hurd et ux* v. *Hodge et al.*, and *Urciola et al.* v. *Hodge et al.*, 334 U. S. 24.

trary to the will of Congress. It is not believed appropriate or within Commission authority for it to make such a decision, except upon the direction of Congress, or mandate of this Court. Up to the present Congress has not issued any such direction, and this Court appears to have no legal or factual basis in this appeal, upon which to issue such a mandate.

CONCLUSION

For the reasons stated, the decree of the District Court should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel.

ALLEN CRENSHAW,
Assistant Chief Counsel.

APPENDIX

INTERSTATE COMMERCE ACT, 49 U. S. C.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request

therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to Chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall

not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15 (1). Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation

other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, *Appellees*.

BRIEF FOR SOUTHERN RAILWAY COMPANY

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No. 25

ELMER W. HENDERSON, *Appellant*,

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, *Appellees.*

BRIEF FOR SOUTHERN RAILWAY COMPANY

OPINIONS BELOW

The opinion of the specially constituted three-judge United States District Court, for the District of Maryland, in Number 3829, Henderson v. United States of America, et al., appears in the Record at pages 248-260 and is reported 80 F. Supp. 32. The decree entered thereon October 28, 1948, appears at page 265 of the Record.

The report of the Interstate Commerce Commission, which gave rise to the proceedings in the District Court, appears at pages 4-11 of the Record, and is reported 269

I.C.C. 73, Elmer W. Henderson v. Southern Railway Company, September 5, 1947.

Prior to those decisions of the Interstate Commerce Commission and the District Court, the case had been heard before the Commission and by the District Court as follows:

No. 2455, Henderson v. United States, et al., 63 F. Supp. 906, December 17, 1945, Record pages 63-79; and

Henderson v. Southern Railway Company, 258 I.C.C. 413, May 13, 1944, Record pages 184-195.

A chronological history of this litigation is submitted herewith as Appendix A, page 39.

JURISDICTION

This is a direct appeal authorized under the Act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Section 1253.

The suit was brought in the District Court under the provisions of 28 U.S.C., Sections 41(28), 43-48, 792, and 49 U.S.C. Section 17(9). Similar provisions under the Act of June 25, 1948: 28 U.S.C., Sections 1336, 1398, 2284, 2321-2325, 49 U.S.C., Section 17(9).

THE STATUTES INVOLVED

Interstate Commerce Act, Part I, 49 U.S.C., Section 3(1) forbidding undue or unreasonable preference or advantage.

Civil Rights Act, 8 U.S.C., Sections 41 and 43.

Constitution of the United States, Article IV, Section 2, clause 1.

Statutes above submitted herewith as Appendix B, pages 40-41.

STATEMENT OF THE CASE

The order (R.4-12) of the Interstate Commerce Commission, sustained by the decree of the District Court (R.265) dismissing appellant's suit, grew out of the following facts:

On May 17, 1942, appellant, a Negro citizen of the United

States, was a passenger on a Southern Railway train leaving Washington, D. C., at 2:00 P.M. en route to Atlanta, Ga. Soon after the first call for dinner, he went to the dining car. White passengers were seated at the tables reserved for Negro passengers. The dining car steward refused to seat appellant at one of the vacant seats in that part of the diner reserved for white passengers. The steward offered to serve appellant at his seat in the Pullman car; he refused to be served there. About 7:00 P.M., appellant returned to the dining car, with the same result. The steward told him to return to his seat in the Pullman car and that he would be sent for as soon as a seat at one of the tables reserved for Negro passengers was available. The steward failed to send for appellant. He was never served. The diner was removed from the train at Greensboro, N. C., about 9:00 P.M. Appellant was the only Negro passenger seeking dining-car service on that trip.

On October 10, 1942, appellant filed a complaint with the Interstate Commerce Commission. He alleged that the steward's action in refusing to serve him unjustly discriminated against him. He prayed an order be entered to require the defendant railway to desist from the alleged discrimination, and in the future to establish and enforce for Negro passengers equal and just dining car facilities. He asked for damages because of the alleged discrimination. He charged violations of Section 3(1) of the Interstate Commerce Act (49 U.S.C. Section 3(1)), the Civil Rights Act (8 U.S.C. Sections 41 and 43) and the Immunities Clause of the Federal Constitution (Article IV, Section 2, Clause 1).

Defendant Railway showed that travel on the train in question was unusually heavy. Travel generally had greatly increased incident to the war. Dining-car facilities were crowded. All passengers, who desired dining-car service, could not be served before the diner reached the end of its run at Greensboro, N. C. The Railway also showed its rules in respect of segregation of white and Negro passengers in dining cars. The rule of July 3, 1941, in effect at the time

of this incident, provided that white and Negro passengers would be served in diners at separate times. If a passenger of one race desired a meal while passengers of the other were being served, such meal would be served in the room or seat occupied by the passenger without extra charge. That if the dining car is equipped with curtains, to divide it into separate compartments, meals might be served to passengers of different races at the same time in their respective compartments. That rule is submitted herewith as Appendix C, page 42.

Before the case came on for hearing before the Interstate Commerce Commission, February 24, 1943, the Railway amended its rule (Appendix D, page 42). The amended rule of August 6, 1942, provided that before starting each meal the steward would draw the curtains in position thus separating the two end tables from the other tables in the diner. He would place a "reserved" card on each of the two tables, one seating four diners and the other seating two. These tables were not to be used for white passengers until seats at other tables in the diner had been taken. Then if no Negro passengers had presented themselves, the curtains might be pushed back, card removed and white passengers served at those tables. And further if after the tables were so occupied by white passengers, should Negroes present themselves, they should be advised that they would be served just as soon as those tables were vacated.

The Interstate Commerce Commission by Division 2 in its report of May 13, 1944 (R.184-195) recited the facts in considerable detail and set out the railway's rule and the amended rule in respect of race separation in dining cars. It found that the steward could have consummated his understanding with appellant by not allowing any other white passengers to be seated at the end tables and thus could have seated and served appellant. Thereupon the Commission determined that appellant had been subjected to undue and unreasonable prejudice and disadvantage, or, broadly stated, discriminated against in violation of Section 3(1)

of the Interstate Commerce Act, but found that he had not been damaged and denied the prayer for damages.

On the facts of record, including the amended rule of defendant railway, the Commission found that substantial equality of treatment was provided in keeping with the decisions of this Court. (*Chiles* v. *Chesapeake & O. Ry.*, 218 U.S. 71 (1910), and *Mitchell* v. *U. S.*, 313 U.S. 80 (1941)). It thereupon determined that no useful purpose would be served by the entry of an order for the future with respect to the rule and dismissed the complaint. *Henderson* v. *Southern Rwy. Company*, 258 ICC 413 (R. 184-195).

Appellant sued in the District Court to set aside the Commission's order. He charged violations of Section 3(1) of the Interstate Commerce Act, of the Civil Rights Act and Federal Constitution (Appendix B, pages 40-41).

The three-judge District Court held that race segregation is not *per se* an abridgement of any constitutional right. The Court said it did not question the authority of the Commission to approve segregation of white and colored passengers by the reservation of particular tables. Upon examining the amended rule, it determined that the rule as amended August 6, 1942, did not provide equality of treatment in that while the majority of the tables were set aside for the exclusive use of white passengers, none was set aside exclusively for Negro passengers. The Court set aside the Commission's order and remanded the case to the Commission for further proceedings in the light of the principles announced by the Court. *Henderson* v. *United States*, 63 F. Supp. 906 (R.63-79).

The case was reheard before the Commission and the further amended rule of the defendant railway introduced, submitted herewith as Appendix E. This rule, effective March 1, 1946, specifically provided for a division of the space in diners for the use of white and colored* passengers.

*Subsequently reference in the rule to "colored" passengers has been changed to read "Negro" passengers. (R. 37.)

The four-seated table at the buffet end of the dining space was set aside for the exclusive use of Negro passengers and the other tables in the diner were set aside for the exclusive use of white passengers. The partition curtain separating this end table from the next table on the same side of the aisle must be drawn and must so remain drawn for the duration of the meal; a "reserved" card to be placed on the table and kept in place at all times during the meal hour, except when such table is occupied by Negro passengers.

The Railway showed that as its dining cars are shopped for repairs, a permanent partition about five feet in height is being substituted for the curtain and the space across the aisle from the four-seated table (set aside exclusively for Negro passengers) is being equipped for the steward's locker and cash register.

Based on a check made by defendant, on its heaviest traveled line, of meals served to white and Negro passengers, it was found that the four-seated table represents slightly more than 8 per cent of the seating capacity in each dining car reserved unconditionally for the use of 4 per cent of the patrons. The Commission so found and, confirming its prior findings, held that the amended dining-car regulations of the railway were not shown to be in violation of Section 3, or any other provision of the Interstate Commerce Act, and dismissed the complaint. *Henderson* v. *Southern Rwy. Company*, 269 ICC 73 (R. 4-11).

Appellant again sued in the District Court for the District of Maryland to set aside this second order of the Commission. He alleged, as before, the violation of the Interstate Commerce Act, Civil Rights Act, and the Federal Constitution.

After hearing, the three-judge District Court upheld the further order of the Interstate Commerce Commission by holding that segregation is not forbidden under the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, as long as there is no real inequality of

treatment of those of different races and found no inequality under the railway's rule. Opinion by District Judge Coleman, District Judge Chestnut concurring, Circuit Judge Soper dissenting. The decree of the Court dismissed the complaint from which final judgment appeal is taken to this Court. *Henderson v. United States,* 80 F. Supp. 32 (R. 248-260).

The railway's rules charge the train conductor with overall control of the train. Submitted herewith as Appendix F, page 44.

ANALYSIS OF DECISIONS BELOW

The opinion of the court below, Sept. 25, 1948, conveniently summarizes the facts from the report of the Commission and the prior decision of the District Court. After briefly stating the facts, which are not in dispute, it was said of the prior decision:

> "On appeal to this Court to set aside the action of the Commission, we held (Henderson v. United States, D.C., 63 F. Supp. 906) that while racial segregation of interstate passengers is not per se forbidden either by the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, the Commission, nevertheless, erred in holding that the Southern Railway's general practice, as evidenced by its then current dining car regulations or instructions, would result in no substantial inequality of treatment between Negro and other passengers seeking dining car service." (R.250).

The flaw in the Railway's rule of August 6, 1942, then before the Court was pointed out in this statement:

> "* * * and while the great majority of the tables are set aside for the exclusive use of white passengers, none is set aside exclusively for Negro passengers." (R.250).

The analogy of the *Mitchell* case (313 U.S. 80, 96, 97) was noted. The provision for serving a Negro passenger at his

seat in the Pullman or coach in lieu of the diner when the table for Negroes was occupied by white passengers was condemned as readily as the railroads' practice in the *Mitchell* case of alloting space to Negro passengers in drawing rooms or compartments only when available. Then Judge Coleman followed with this statement:

> "'While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.'" (R. 251).

and again:

> "With respect to the requirement in the Southern Railway's then current dining car regulations that tables for Negro passengers be curtained, we found that this did not violate the rule of substantial racial equality, and stated that the method of carrying out the principle of racial segregation on interstate carriers was a matter for the Commission to determine." (R.252).

The order of the Commission was set aside because there was no provision in the railway's rule for dining space for the exclusive use of Negroes.

The Court set out the amended rule effective March 1st, 1946 (Appendix E). It provided that one table seating four persons "shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers"; and further:

> "Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal."

The Commission reopened the case, approved its prior findings, and found the new regulations (Rule March 1st, 1946) "were not in violation of Section 3, or any other pro-

vision of the Interstate Commerce Act" and dismissed the complaint. (R.4-12).

Judge Coleman then said:

> "The case is before us on the testimony presented to the Commission. The correctness of its factual analysis of this testimony as contained in its report is not questioned. Thus, it will be seen that the Railway's amended dining car regulations, contrary to the prior regulations, require the setting aside of a table, seating four persons, exclusively for the use of Negro passengers. Also, the uncontradicted evidence presented to the Commission shows that up to the date of the Commission's deci ion, the number of Negro passengers seeking dining car service rarely if ever exceeded that number on any one trip. Should that happen, however, the situation would be no different from those instances not infrequently occurring in interstate railroad transportation, where more white passengers seek dining car service than can be seated at one time. In short, the new regulations, the Commission found, are designed to take into account, with all due regard to the density of Negro travel requiring dining car service, the probability that a Negro passenger may not desire a meal as soon as he boards the train, or that he may board the train at an intermediate point after the dining car service has been begun, and may desire at that time or later to be served in the dining car." (R.255-256).

and:

> "We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the

kitchen end of the dining car, directly opposite the space newly provided for the steward's office. The undesirability of this location compared with that of tables in other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, nonexistent. Therefore, it necessarily follows that this present complaint must be dismissed unless the Supreme Court has, in some decision or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation." (R.256-257).

Judge Coleman turned to two decisions of this Court subsequent to the prior decision of the District Court, *Morgan* v. *Virginia*, 328 U.S. 373 (1946) and *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948).

As to the first (328 U.S. 373) he said:

"That the Supreme Court in the Morgan case very definitely recognized the distinction between the two types of cases, namely, those involving the validity of a State statute and those involving the rule of a carrier requiring segregation of interstate passengers, is indicated by the following footnote, 328 U.S. on page 377, 66 S. Ct. on page 1053: 'When passing upon the (a) rule of a carrier that required segregation of an interstate passenger, this Court said, "And we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make." Chiles v. Chesapeake & Ohio R. Co., 218 U.S. 71, 75, 30 S.Ct. 667, 668, 54 L.Ed. 936, 20 Ann. Cas. 980.' See also Simmons v. Atlantic Greyhound Corporation, D.C. (W.D.Va.), 75 F. Supp. 166; Stamps v. Louisville & Nashville Railroad Co., 269 I.C.C. 789." (R. 258).

As to the second (333 U.S. 28) he said:

"In its opinion in the Bob-Lo Excursion Company case, the Supreme Court distinguished Morgan v. Virginia, supra, and Hall v. Decuir, 95 U.S. 485, 24 L.Ed. 547, saying (333 U.S. 28, at pages 39, 40, 68 S. Ct. 358,

at page 364): 'The regulation of traffic along the Mississippi River, such as the Hall case comprehended and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here.'" (R.259).

Judge Coleman did not overlook the recent "Covenant" cases

> "* * * prohibiting sales of realty to Negroes, Shelley v. Kraemer (McGhee v. Sipes), 334 U.S. 1, 68 S.Ct. 836; and Hurd v. Hodge (Urciolo v. Hodge), 334 U.S. 24, 68 S.Ct. 847, obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden. On the contrary, they recognize the legality of agreements to this effect. They merely hold that such agreements, although lawful, are not enforceable by court process. Thus, they have no relation to the principles governing the conduct of interstate transportation by common carrier." (R.259).

and summarizing said:

> "... (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I.C.C. 73, at page 76): 'Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future.' To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and

fails to meet the equality test when there is any empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach,—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, every seat in the dining car may be occupied.

"For the reasons herein set forth the complaint must be dismissed." (R. 260).

THE QUESTION PRESENTED FOR DECISION

The appeal brings to this Court for decision the question whether racial segregation of interstate passengers is forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, so long as there is equality of treatment of those of different races. The question arises under the rule of the Railway whereby the space in its dining cars is divided: one portion for the exclusive use of Negro passengers and the remaining part for the exclusive use of white passengers. It is the operation of the rule of the Railway that gives rise to the question for decision; not the segregation statute of the State of Virginia in which state the incident here in question occurred.

SUMMARY OF ARGUMENT

The case at bar is ruled by decisions of this Court:

Hall v. *DeCuir*, 95 U.S. 485 (1877).
Plessy v. *Ferguson*, 163 U.S. 537 (1896).
Chiles v. *Chesapeake & O. Ry.*, 218 U.S. 71 (1910).
Morgan v. *Virginia*, 328 U.S. 373 (1946).

Segregation with equal treatment to both races is supported by decisions of this Court in the "School" and other cases:

"School" cases:

Missouri Ex Rel. Gaines v. *Canada*, 305 U. S. 337 (1938).
Sipuel v. *Board of Regents*, 332 U.S. 631 (1948).
Fisher v. *Hurst*, 333 U.S. 147 (1948).
Sweatt v. *Painter* (Court of Civil Appeals, Austin), 210 S. W. (2d) 442 (1948), note at p. 444.

"Passenger Train" cases:

McCabe v. *A. T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).
Mitchell v. *U. S.*, 313 U.S. 80 (1941).
Chiles v. *Chesapeake & O. Ry.*, 218 U.S. 71 (1910).

"Municipal Street" cases:

Cox v. *New Hampshire*, 312 U.S. 569 (1941).

The lower Federal Courts are currently upholding segregation rules of common carriers of passengers:

Day v. *Atlantic Greyhound Corporation*, 171 F. (2d) 59 (C.C.A. 4, 1948).
Simmons v. *Atlantic Greyhound Corp.*, 75 F. Supp. 166 (W.D.Va., 1947).
Solomon v. *Pennsylvania R. Co.*, 79 F. Supp. 449 (S.D. N.Y., 1948).

Interstate Commerce Commission has sanctioned regulations of carriers requiring separation of white and Negro passengers with equal treatment of each:

Councill v. *Western & Atlantic R.R. Co.*, 1 I.C.C. 339 (1887). 1 Inters. Com. Rep. 638 (1887).
Mays v. *Southern Railway Company*, 268 I.C.C. 352 (1947).

Stamps and Powell v. *Louisville & N. R. Co.*, 269 I.C.C. 789 (1948).
Heard v. *Georgia Railroad Company*, 1 I.C.C. 428, 1 Inters. Com. Rep. 719 (1888).
Heard v. *Georgia Railroad Company*, 3 I.C.C. 111, 2 Inters. Com. Rep. 508 (1889).
Edwards v. *N. C. & St. L. Ry.*, 12 I.C.C. 247 (1907).
Evans v. *C. & O. Ry. Co.*, 92 I.C.C. 713 (1924).
Crosby v. *St. L.-S. F. Ry. Co.*, 112 I.C.C. 239 (1926).

The long continued and uniform practice of the Interstate Commerce Commission in construing and applying Section 3(1) of the Act is entitled to great weight:

Logan v. Davis, 233 U.S. 613, 627 (1914).
Kern River Co. v. *United States*, 257 U.S. 147 (1921).
Swendig v. *Washington Water Power Co.*, 265 U.S. 322, 331 (1924).
United States v. *Minnesota*, 270 U.S. 181, 205 (1926).
Wisconsin v. *Illinois*, 278 U.S. 367, 413 (1929).

Safety and comfort of passengers and good order on trains prompts separation of the races.

The railway's rule accords white and Negro passengers equal treatment in dining cars.

ARGUMENT

The Case at Bar is Ruled by Decisions of this Court

Hall v. *DeCuir*, 95 U.S. 485 (1877). DeCuir, a Negro woman, took passage from New Orleans, La., to Hermitage, La., on a river steamer operating from New Orleans, La., to Vicksburg, Miss. The Master of the steamer refused to admit DeCuir to a cabin set aside for white persons. A statute of Louisiana recognized the right of common carriers of passengers to refuse admittance of persons to their vehicles provided such rules made no discrimination on account of race or color and the statute gave a right of action to

recover damages for violation of the proviso. Judgment in DeCuir's favor was affirmed in the State Supreme Court, but reversed in this Court. In the opinion Mr. Justice Waite said (p. 488):

> "* * * we think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position."

and added (p. 489):

> "* * * No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

From the foregoing it will be clearly seen that while the decision in the *DeCuir* case struck down the State statute as a burden upon interstate commerce, the over-all direct effect of the decision was to uphold the rule of the steamer whereunder the Master, Benton, refused a Negro passenger access to the cabin set aside exclusively for white passengers. That the steamer's rule was thus upheld is made clear by the following statement (p. 490):

> "* * * As was said by Mr. Justice Field, speaking for the court in *Welton* v. *The State of Missouri*, 91 U.S. 282, 'inaction (by Congress) . . . is equivalent to a declaration that inter-state commerce shall remain free and untrammelled.' Applying that principle to the circumstances of this case, congressional inaction left Benson (the master) at liberty to adopt such reasonable rules

and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned."

In *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), another statute of Louisiana was before the Court. It declared that Railways shall provide equal but separate accommodations for white and colored races, and further that a passenger failing to observe the segregation requirement might be fined or imprisoned. Plessy was a passenger between two stations within the state of Louisiana. He insisted upon occupying a seat in the coach set aside to accommodate white passengers. He was ejected and imprisoned. The Supreme Court of Louisiana affirmed his conviction. *Ex parte Plessy*, 45 La. Ann. 80. On writ of error to this Court the constitutionality of the State Act was attacked upon the ground that it was in conflict with the Fourteenth Amendment which prohibits certain restrictive legislation on the part of the States. This Court affirmed in an opinion by Mr. Justice Brown holding that the enforced separation of the races as applied to the internal commerce of the State neither abridges the privileges or immunities of the colored man, deprives him of his property without due process, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment. In that connection, Mr. Justice Brown said (pp. 544, 550, 551):

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the

exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

"* * * If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.'"

Chiles v. *Chesapeake & Ohio Railway*, 218 U.S. 71 (1910). Chiles, a colored passenger on the C. & O. Railway, was traveling from Washington, D. C., to Lexington, Ky. At Ashland, Ky., he had to change to another train. Upon boarding it he went into a car which "under the rules and regulations of defendant in error, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of colored persons." He sued in the State Court for damages; judgment on a jury verdict for the defendant was affirmed by the Ken-

tucky Court of Appeals. In an opinion delivered by Mr. Justice McKenna this Court affirmed, from which opinion we quote (p. 74):

> "* * * The complaint of the action of the court rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations. Plaintiff in error makes some effort to keep the statute in the case, and says that the trial court, by its ruling upon testimony and by its instructions, confined 'the jury only to the lesser motive' of defendant's 'wrongful act.' In other words, as we understand plaintiff in error, confined the jury to the consideration of the regulations of the railroad company and withdrew from its consideration the effect of the statute under which, it is said, the conductor declared he acted. But by this we understand plaintiff in error to illustrate that his rights as an interstate passenger were denied. We are, therefore, brought back to the question what his rights as such passenger were.
>
> "The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant."

In reaching its conclusion to affirm, the opinion cited and quoted with approval from *Hall* v. *DeCuir*, (95 U.S. 485), and *Plessy* v. *Ferguson*, (163 U.S. 540), adding:

> "* * * Regulations which are induced by the general sentiment of the community for whom they are made

and upon whom they operate, cannot be said to be unreasonable. See also *Chesapeake & Ohio Ry. Company* v. *Kentucky*, 179 U.S. 388."

Morgan v. *Virginia*, 328 U.S. 373 (1946). Irene Morgan was a Negro interstate passenger on a common carrier bus in Virginia. The State statute required passenger motor vehicle carriers, both interstate and intrastate, to separate, without discrimination, white and colored passengers. Upon her refusal to accede to the request of the driver of the bus to remove to a back seat in the vehicle, partly occupied by other colored passengers, so as to permit the seat vacated to be used by a white passenger, she was arrested and convicted of violating the Virginia statute. Her conviction was affirmed by the Supreme Court of Appeals of Virginia, 184 Va. 24. On appeal, this Court reversed in an opinion by Mr. Justice Reed holding that the Virginia statute was an undue burden on interstate commerce. In reaching this conclusion, he said (p. 381):

"On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort and convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey."

The decision on this appeal did not turn on any rule of the motor common carrier; on the contrary Mr. Justice Reed was careful to point out in a footnote at page 377:

"When passing upon a rule of a carrier that required segregation of an interstate passenger, this Court said,

'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' *Chiles* v. *Chesapeake & Ohio R. Co.*, 218 U.S. 71, 75."

It is not amiss to stress the fact here that Mr. Justice Reed referred to *Hall* v. *DeCuir*, 95 U.S. 485, and the soundness of this Court's decision therein (p. 383) and quoted at great length therefrom in a footnote at page 384.

From the foregoing it will be seen that the decisions of this Court from 1877 to 1946 have uniformly upheld the principle of segregation of white and Negro passengers in common carrier vehicles, equality of treatment being accorded both races, under appropriate rules of the common carriers.

Segregation, With Equal Treatment To Both Races, Is Supported by Decisions of this Court in the "School" and Other Cases.

The rule announced by this Court in dealing with rules and regulations of common carriers of passengers just discussed is supported by the decisions of this Court in what may be termed "The School Cases." In the leading case of *Missouri Ex Rel. Gaines* v. *Canada*, 305 U.S. 337 (1938), it appeared that the State of Missouri maintained a university for white students, and another, known as Lincoln University, for the higher education of Negroes. The point was made that Lincoln University had no law school in connection therewith, whereas the State University did have a law school for white students. Gaines, a Negro, was refused admission to the law school at the State University, the state authorities answering that he might have law instruction at the law schools of one of the neighboring states such as that maintained in Kansas for Negroes. This answer of the state authorities was rejected in this Court for lack of equality of treatment by the state in dealing with the two races. At page 349, Mr. Chief Justice Hughes said:

"* * * The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State."

And, at page 351, the Chief Justice quoted from *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, in part, as follows:

"* * * Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

The two most recent cases follow the *Gaines case*:

Sipuel v. *Board of Regents*, 332 U.S. 631 (1948).
Fisher v. *Hurst*, 333 U.S. 147 (1948).

Mr. Chief Justice McClendon of the Court of Civil Appeals of Texas, (Austin), in *Sweatt* v. *Painter* (1948), 210 S.W. (2d) 442, dealt with a so-called "School" case. At pages 443-444 he said:

"At the outset it should be borne in mind that the validity of state laws which require segregation of races in state supported schools, as being, on the ground of segregation alone, a denial of due process, is not now an open question. The ultimate repository of authority to construe the Federal Constitution is the Federal Supreme Court. We cite chronologically, in a note below, the unbroken line of decisions of that tribunal recognizing or upholding the validity of such segregation as against such attack.*

"The gist of these decisions is embodied in the following excerpts from the opinion in Plessy v. Ferguson (Mr. Justice Brown writing):

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* *Hall* v. *DeCuir*, 1878, 95 U.S. 485, 24 L. Ed. 547; *Plessy* v. *Ferguson*, 1896, 163 U.S. 537, 16 S.Ct. 1138, 1140, 41 L. Ed. 256; *Cumming* v. *County Board of Education*, 1899, 175 U.S. 528, 20 S.Ct. 197, 44 L. Ed. 262; *McCabe* v. *A. T. & S. F. R. Co.*, 1914, 235 U.S. 151, 35 S.Ct. 69, 59 L. Ed. 169; *Gong Lum* v. *Rice*, 1927, 275 U.S. 78, 48 S.Ct. 91, 72 L. Ed. 172; *Missouri* v. *Canada*, 1938, 305 U.S. 337, 59 S.Ct. 232, 83 L. Ed 208; *Sipuel* v. *Oklahoma*, 1948, 68 S.Ct. 299, 92 L. Ed. 247.

'The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.' "

Segregation, with equal treatment, on passenger trains is supported by:

McCabe v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).

Mitchell v. *U. S.*, 313 U.S. 80 (1941).

And we submit the broad question finds support in *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). In that decision Chief Justice Hughes dealt with "civil liberties" invoked in the case at bar by appellant. We quote the Chief Justice at page 574:

"* * * The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."

We pause to say that the civil rights, 8 U.S.C. Sections 41 and 43, (Appendix B), appellant seeks to inject into the case at bar relate to action by a State; not to rules of common carriers of passengers.

The Lower Federal Courts Are Currently Upholding Segregation Rules of Common Carriers of Passengers.

Day v. *Atlantic Greyhound Corporation*, 171 F. (2d) 59 (C.C.A. 4, 1948), wherein Circuit Judge Soper, who delivered the opinion of the Court, specifically cited and relied upon *Hall* v. *DeCuir*, 95 U.S. 485, *Chiles* v. *C. & O. Ry. Co.*, 218 U.S. 71, and *Morgan* v. *Virginia*, 328 U.S. 373.

Simmons v. *Atlantic Greyhound Corporation*, 75 F. Supp. 166 (W.D. Va., 1947). District Judge Paul relied upon and followed the *DeCuir*, the *Chiles* and the *Morgan cases*.

Solomon v. *Pennsylvania R. Co.*, 79 F. Supp. 449 (S.D. N.Y., 1948). District Judge Goddard relied upon and followed the *Morgan case*, saying at page 450 it "reiterated the controlling effect of *Chiles* v. *Chesapeake & O. R. R.*, which held that a railroad could make reasonable rules and regulations as to segregation of colored and white passengers in interstate travel."

Interstate Commerce Commission Has Sanctioned Regulations of Carriers Requiring Separation of White and Negro Passengers With Equal Treatment of Each.

The Commission, in the very first year of its existence, sanctioned rules of common carriers requiring separation of white and Negro passengers. The first case before the Commission on this question was *Council* v. *Western & Atlantic R. R. Co.*, 1 I.C.C. 339 (1887), 1 Inters. Com. Rep. 638, where, at page 641, it was said:

> "Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or un-

> just preferences in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

The Commission has consistently so held through the *Hendson case* now before this Court, in *LeFore and Crishon* v. *Gulf, M. & O. R. Co.*, 262 I.C.C. 403 (1945), in *Barnett* v. *Texas & P. Ry.*, 263 I.C.C 171 (1945), and in *Mays* v. *Southern Railway Company*, 268 I.C.C. 352 (1947). These were dining-car cases. They cited with approval and followed the Commission's decision in the *Henderson case*. There are numerous cases between 1887 and 1947. A few are: *Heard* v. *Georgia Railroad Company*, 1 I.C.C. 428; *Heard* v. *Georgia Railroad*, 3 I.C.C. 111; *Edwards* v. *N. C. & St. L. Ry.*, 12 I.C.C. 247; *Evans* v. *C. & O. Ry. Co.*, 92 I.C.C. 713. See also *Crosby* v. *St. L.-S.F.Ry.Co.*, 112 I.C.C. 239.

The most recent dining-car case decided by the Commission is *Stamps and Powell* v. *Louisville & N. R. Co.*, 269 I.C.C. 789 (Divn 3, February 25, 1948). This decision is in harmony with the Commission's decisions in the *Henderson* (on further hearing) and *Mays cases*. It contains a complete review of the authorities upon which the Commission has relied in the disposition of these cases. Omitting authorities we quote the following from page 794:

> "The Commission, within a few months after its organization, expressed the conclusion that the separation of white and Negro passengers paying the same fare is not in violation of section 3 of the act if cars and conditions equal in all respects are furnished to both and the same care and protection of passengers is observed. *Council* v. *Western & Atlantic R. Co.*, 1 I.C.C. 339; *Heard* v. *Georgia R. Co.*, 1 I.C.C. 428. It has adhered to that conclusion consistently. Although the question has been constantly and persistently agitated before the public and the Congress for many years, the Congress has done nothing to indicate that it did not concur in the Commission's interpretation of the act."

This shows the continuity of decision on the part of the Interstate Commerce Commission.

The Long Continued and Uniform Practice of the Interstate Commerce Commission in Construing and Applying Section 3(1) of the Act is Entitled to Great Weight.

In these decisions the Commission has been construing and applying the provisions of Section 3(1) of the Act. In so far as pertinent here paragraph 1 of Section 3 reads today exactly as when enacted in the original Act to Regulate Commerce in 1887 (24 Stat. 380), see Appendix B, page 40. Thus we have an interpretation or application of the act to a practical factual situation confronting the railroads. The act has been amended many times; Section 3 itself several times. The interpretation or application adopted by the Commission is in keeping with the repeated decisions of this Court. The *DeCuir, Plessy, Chiles* and *Morgan* cases cover a span of seventy years.

In that background a familiar principle seems applicable. It is that long continued and uniform practice of the administrative agency is entitled to great weight and will not be disturbed except for cogent reasons. *Logan* v. *Davis* (1914), 233 U.S. 613, 627; *Kern River Co.* v. *United States* (1921), 257 U.S. 147, 154; *Swendig* v. *Washington Water Power Co.*, (1924), 265 U.S. 322, 331; *United States* v. *Minnesota*, (1926), 270 U.S. 181, 205; *Wisconsin* v. *Illinois* (1929), 278 U.S. 367, 413.

H. R. 22 was introduced on January 3, 1949, in the 81st Congress to amend Section 3(1) of the Interstate Commerce Act to prohibit the segregation of passengers on account of race or color. Submitted herewith as Appendix G. It has not become law. Its introduction is an indication that a new law would be needed if the existing, well-settled rule is to be changed.

Safety and Comfort of Passengers and Good Order on Trains Prompts Separation of the Races.

The separation of the races is based upon considerations of the safety, comfort, and general satisfaction of travelers of both races. The evidence in the case at bar clearly supports separation. Witness McClain, Assistant Vice President in charge of transportation of the defendant Railway, testified that the separation is due to the temperament of the people of the South through which the Railway operates. It is a matter of keeping peace and good order on the trains. The rule is to meet the feeling and attitude of the people of both races. It is not all a matter of white passengers resenting the presence of Negro passengers in space set aside exclusively for white passengers, for Mr. McClain showed there is resentment on the part of Negro passengers if whites occupy the space assigned exclusively for Negroes. As he said: "They even object to the white trainman having a seat in their compartment." (R. 167-169).

Mr. McClain pointed out that the Railway operates in the states South of the Ohio and Potomac rivers in which there are segregation laws (R.169). It is generally recognized that the laws adopted in the several states may be said to reflect the temperament and sentiment and views of the citizens of those states, so it is here a reference was made to existence of those laws and they were identified for convenient reference by an exhibit filed before the Commission, reproduced here for convenient reference as Appendix H, pages 45-46.

Appellant's attorney in cross-examining witness McClain asked as his first question:

> "(By Mr. Lawson) Is it fair to assume your testimony is this, the rule and policy of the Company is based on your desire to keep peace and good order among the races?"

To which Mr. McClain replied:

> "Absolutely." (R. 170).

Appellant conceded the right of the defendant railway to make reasonable rules and regulations for the conduct of its business and to protect its interest and that of the traveling public necessary to the performance of its duties. (R.23).

The Railway's Rule Accords White and Negro Passengers Equal Treatment in Dining Cars.

The space allotted to Negro passengers was shown in the record in the case at bar to be equal in kind to that allotted to white passengers and the quantity of the space so assigned was shown to be adequate.

For the purpose of showing that the space reserved exclusively for Negro passengers is adequate, defendant introduced through Witness Thomas, its Superintendent of Dining Cars, the results of two tests showing the relation between the number of white and Negro passengers served in its dining cars between Atlanta, Ga., and Washington, D. C. (Exs. 8-9, R. 225-247). The first of these tests covered the period May 14 to 24, inclusive, 1945. It shows that out of 37,615 meals 446, or 1.19 per cent, were served to Negro civilians, and 706, or 1.88 per cent, to Negro service people, making a total of 1,152, or 3.06 per cent, served to Negro passengers. The second test covered the period October 1 to 10, inclusive, 1946. It shows that out of a total of 20,789 meals 723, or 3.48 per cent, were served to Negro civilians, and 149, or 0.72 per cent, to Negro service people, making a total of 872, or 4.2 per cent, served to Negro passengers. (R.9).

Defendant's dining cars contain 48 seats (R. 129, 142) and, after installation of the stewards' offices, will contain 44 seats. Thus, under defendant's new regulations, approximately 8 per cent of the seat space is reserved exclusively to accommodate 4 per cent of its patrons (R.9). It is submitted that this is a most reasonable division of the available dining-car space. The Commission recited the defendant's evidence and concluded:

"* * * On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space." (269 I.C.C. 76, 77, R.9).

Witness McClain, Assistant Vice President of the Railway, testified very definitely, in response to a question by appellant's counsel, that the table set aside for exclusive use of Negro diners was just as comfortable and convenient as the tables set aside for the exclusive use of white persons (R. 214).

Witness McClain identified a series of photographs at the further hearing before the Commission which clearly show that the table assigned exclusively for the use of Negro passengers is identically the same kind and character as that set aside for white passengers. (Exs. 4, 5, 6, 7, R. 199-202, 224A, 224B, 224C, and 224D).

There is not a scintilla of evidence in the record in the case at bar to indicate any difference in quality of service furnished by the Railway to its passengers desiring dining car service whether they be white or Negro.

The Interstate Commerce Commission in the exercise of its appropriate jurisdiction has passed upon the factual situation bearing upon equality of service and made this definite finding:

"On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space." (R. 9.)

and

"We further find that the dining-car regulations established by defendant (Southern Railway) effective March 1, 1946, and currently in force, are not shown to be in violation of section 3, or of any other provision of the act. An order for the future is not necessary. The complaint will be dismissed." (R. 10.)

The three-judge District Court has affirmed the findings of the Commission.

The Arguments in Appellant's Brief Fail to Show Error in the Decision of the District Court.

Appellant argues that the railway's dining-car rule violates Section 1(4) of the Interstate Commerce Act (Brief, pp. 30-37). We submit appellant is in error. This paragraph imposes the duty on railroads to establish through routes and to make reasonable rules and regulations with respect to their operation. A through route has been defined as "an arrangement, express or implied, between connecting railroads for the continuous carriage of goods [or passengers] from the originating point on the line of one carrier to destination on the line of another." *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139, N. 2. (1917).

It is clear, we submit, that the provisions of Section 1(4) have nothing whatever to do with the railway's rule covering the seating of passengers in its dining cars.

It is argued by appellant that the railway's dining-car rule violates Section 3(1) of the Interstate Commerce Act (Brief, pp. 24-30), not because the accommodations furnished Negro passengers are not substantially equal to those furnished for white passengers but apparently because under the railway's rule Negro passengers are not permitted to occupy the tables reserved for white passengers.

Section 3(1) only requires that railroads furnish facilities which are substantially equal. That identical facilities are not required under Section 3(1) is clear from the decision in *Mitchell* v. *U. S.*, 313 U. S. 80, holding that "colored persons * * * must be furnished with accommodations equal in comforts and conveniences to those afforded to * * * white passengers" (p. 95).

The appellant erroneously contends that the Commission's failure to declare the railway's rule to be a violation

of the Interstate Commerce Act thereby violates the Fifth Amendment (Brief, pp. 38 *et seq*).

Unlike the Fourteenth Amendment, cases decided under which the appellant uses so freely in his argument, the "Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process". *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

Here no discriminatory legislation by Congress is involved. The segregation to which appellant objects results solely from a rule of the railway made by the railway to protect its passengers and itself.

Even in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), where this Court held that the equal protection clause of the Fourteenth Amendment prevented state courts from enforcing convenants in real estate deeds which restricted the ownership and use of property to certain races, this Court specifically stated that such agreements were not violative of the Fourteenth Amendment (p. 13). This Court also made it clear in *Shelley* v. *Kraemer* that its decision did not depend on the due process clause (p. 23).

Likewise, in *Hurd* v. *Hodge*, 334 U. S. 24 (1948), this Court in deciding a case of similar facts occuring in the District of Columbia declined to rest its decision on basis of the due process clause of the Fifth Amendment (p. 30). The case was decided under Section 1978 of the Revised Statutes and; as in the Shelley case, this Court took the position that the Statute "does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms" (p. 31).

The railway did not ask the Interstate Commerce Commission to enforce its rule; the Commission has not undertaken to do so. This is simply a case in which the Commission in the exercise of its primary jurisdiction has determined that the rule does not interfere with the authority which Congress has assumed over interstate commerce by its enactment of Section 3(1) of the Interstate Commerce

Act. That Congress has not legislated against segregation as an interference with interstate commerce is evidenced by the fact that in recent years a number of bills to prohibit segregation in interstate commerce have been introduced, but Congress has consistently failed to enact such legislation;* and so despite the fact that the Interstate Commerce Act has been amended time and again.

Appellant, in an effort to get some support from *Shelley* v. *Kraemer*, vainly argues that the order of the Interstate Commerce Commission here involved is an order of the Federal government, and thus undertakes in error to invoke the Fifth Amendment clearly recognizing that the Fourteenth Amendment has no relation whatsoever to the case. We submit that by dismissing appellant's complaint the Interstate Commerce Commission has not entered an order which under any construction might be held to be an order of the Federal government. Appellant undertakes to support his argument by reference to the decision of the District Court wherein he quotes the Court as saying:

> "* * * Therefore, they [the carrier's rules] are to be treated, for the purposes of this complaint, as in effect the Commission's rules." (Brief, p. 46.)

Appellant's reference to page 74 of the transcript in support of that quotation will show that it was lifted from the opinion of the District Court of December 17, 1945, in the first case, Docket 2455 (R. 63). The decree (R. 79) set aside the Commission's order and remanded the case to the Commission for further proceedings. That decree finally terminated the proceedings in Docket 2455.

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* H. R. 8821, 75th Cong., 3d Sess., 83 Cong. Rec. 74; H. R. 182, 76th Cong., 1st Sess., 84 Cong Rec. 27; H. R. 112, 77th Cong., 1st Sess., 87 Cong. Rec. 13; H. R. 1925, 79th Cong., 1st Sess., 91 Cong. Rec. 749; H. R 280, 80th Cong., 1st Sess., 93 Cong. Rec. 47; H. R. 831, 81st Cong., 1st Sess., 95 Cong. Rec. 76.

Thereafter the case was reheard before the Commission (R. 196) and on further hearing, decided September 5, 1947 (R. 4), the Commission found:

> "• • • We further find that the dining car regulations established by defendant effective March 1, 1946, and currently in force, are not shown to be in violation of section 3 or of any other provision of the act. An order for the future is not necessary. The Complaint will be dismissed. (R. 10.)

On that date the Commission entered its order:

> "*It is ordered,* That the complaint in this proceeding be, and it is hereby, dismissed." (R. 12.)

On December 11, 1947, appellant again sued in the United States District Court for the District of Maryland where his action was docketed as No. 3829 to enjoin and set aside the order of the Interstate Commerce Commission entered after its further hearing (R. 1-4). In the opinion of the court in Docket No. 3829 filed September 25, 1948, Judge Coleman reviewed at some length the prior decision of the court in Docket 2455 and nowhere therein referred to the quoted sentence on which appellant here relies (R. 248-260). It is the decree entered in this second case which is before this Court on this appeal (R. 265).

It may fairly be said, therefore, that the court in its decision in the second case advisedly refrained from making the comment on which appellant here relies in support of his argument that the Commission's order is an order of the Federal government.

That the order of the Commission involved in this case is not an order of the Federal government is made quite clear by the decisions of this Court and the Interstate Commerce Commission. In *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370 (1932), this Court held that where the Commission has prescribed rates for the future, which the carriers are required to observe, it may not later reverse its own requirement and, thereupon, award reparation on a

lower basis of rates. The opinion, with care, pointed out that rates prescribed by the Commission for the future can not be changed by the carrier, for the carrier is "bound to conform to the order of the Commission." The point here is that there is no requirement in the order of the Commission that the railway shall observe any specific rule. The railway may amend the rule of March 1, 1946, as occasion may require; indeed, it has been amended so as to substitute the word "Negroes" throughout for the words "colored persons" (R. 37). A contrary situation would have arisen had the Commission, in response to the prayer of appellant's complaint, prescribed a form of rule which the railway, under the Commission's order, would be required to observe. Nowhere in the order which appellant here seeks to enjoin will be found any compulsion on the carrier to observe the rule under consideration, or any other rule.

Following the decision in the *Arizona Grocery case, supra,* the carriers contended before the Interstate Commerce Commission that where it had found a rate assailed not to have been shown to be unreasonable, the rule of the *Arizona Grocery case* should apply so that the Commission could not award reparation out of such rates. The Commission uniformly held that such a rate was still a carrier-made rate and not a Commission-prescribed rate like the rate involved in the *Arizona Grocery case,* and thus declined to extend the principle. In *Alabama Rock Asphalt, Inc.* v. *Akron & B. B. R. Co.*, 203 I. C. C. 8 (1934), the Commission said:

> "* * * The principle announced in the *Arizona Grocery Co. case* has no application where the establishment of maximum reasonable rates for the future has not been required." (p. 12.)

In *Great Lakes Steel Corp.* v. *Alton R. Co.*, 237 I. C. C. 635 (1940), the Commission said:

> "Defendants contend that the rates assailed were prescribed as reasonable in *West Coast Lumbermen's*

Ass'n. v. *Akron, C. & Y. Ry. Co.*, 183 I. C. C. 191 and 192 I. C. C. 343. The rates assailed were not prescribed by the Commission but were carrier-made and were part of the adjustment that was merely found not unreasonable in that proceeding; therefore, the principle announced in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co., supra*, has no application here." (pp. 635-636.)

This Court has upheld the view of the Commission in the cases just cited. In *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 (1943), Mr. Justice Jackson, speaking for the Court, stated at page 686:

"• • • The finding of the Commission that the proposed schedules 'are not shown to be otherwise unlawful' is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension. Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations."

We submit that the Commission's finding that the dining-car rule established by the railway, effective March 1, 1946, and currently in force, was not shown to be in violation of Section 3, or any other provision of the Act, can not be held to be a "Commission-made rule" and by no stretch of the imagination an order or requirement of the Federal Government, hence appellant's effort in that connection to invoke the Fifth Amendment utterly fails.

CONCLUSION.

We submit the question presented for decision in this case is whether segregation of interstate passengers in dining cars of common carriers by railroad is forbidden by any provision of the Federal Constitution, the Interstate Commerce Act, or any other Act of Congress, so long as there is equality of treatment accorded white and Negro

passengers desiring dining car service. The record before the Commission and before the District Court amply justifies our statement of the real question in issue. At the first hearing before the Interstate Commerce Commission appellant himself very frankly stated the real ground of his complaint to be that the railway failed to serve him in its dining car when there were vacant seats at tables reserved for white passengers or at tables for Negro passengers which were then partly occupied by white passengers. When asked why he did not accept the steward's offer to serve him at his seat in the Pullman car he answered:

> "Because I felt under the law I had a perfect right to eat in the dining car, if there were seats available at the tables." (R. 96.)

And he added:

> "I felt that I should have been served in the dining car, because there were vacancies, that there were not only seats at other tables, there were also seats at these two tables behind the drawn curtain. That is the basis for my complaint." (R. 104.)

When the case came on for further hearing before the Interstate Commerce Commission appellant's attorney stated:

> "Mr. Examiner, we have no testimony, no witnesses. There is no dispute I think about the facts and my understanding of the court's decree is that it is a matter of law and a matter of new or certainly different regulations so for that reason we don't have any testimony." (R. 198.)

Appellant testified on his own behalf; there was no other witness for appellant.

Throughout the course of this litigation, indeed, from the quotations from the record just made, it appears that under appellant's concept of his rights in the premises he was entitled to enter the dining car if and when he pleased

and demand service therein upon seating himself at any vacant seat at any table in the diner. Appellant's position inevitably leads to that assertion of right. Yet in the very teeth of it we find appellant's counsel stated to the Court, upon the second trial in the District Court:

> "We concede that the carriers have the right to make reasonable regulations." (R. 23.)

It must be perfectly obvious, and a matter of general knowledge, that dining cars can not possibly in every instance accompany a train throughout the entire length of its journey. Likewise, there must be some hours during which the different meals are to be served. Similarly, it is the duty of the dining car steward to seat passengers at the different tables as they enter the diner so as to facilitate their prompt service by the several waiters. And of equal importance it is the duty of the steward to supervise the conduct of the service in the diner so as to avoid friction and preserve order to the comfort of the passengers using the dining car facilities. The dining car service is, of necessity, carried on in a limited space upon a moving train. Without reasonable regulations, a satisfactory service would be impossible. In a word, there is no such thing as leaving to each individual passenger the right to exercise his own choice as to when he will be served or where he will be served. With these broad principles, briefly stated, in mind, the railway involved in this case has provided a rule separating white and Negro diners by assigning certain space to be occupied by the white passengers for the full duration of the meal and certain other space in the diner assigned to the use of Negro passengers for the full duration of the meal. Such separation is in the interest of harmony, peace and good order. The habits, temperament and feelings of the people throughout the southern states, through which this railway operates, are registered in the statutes of the southern states. By those statutes the southern people speak their views, customs, habits and

feelings. Failure on the part of this railway to recognize the practical situation with which it is confronted because of the temperament, views and habits of those people would be to invite discord, friction and strife. The reported authorities from the decisions of this Court, hereinabove set out, have uniformly upheld separation of white and Negro passengers in common carrier vehicles from 1877 to 1946. As late as 1946 this Court, in *Morgan* v. *Virginia* (328 U. S. 377), recognized the right—it might well be said the duty—of common carriers by rail to provide reasonable rules for such segregation. The principle so recognized likewise finds complete support in the so-called "School" cases and in the "Municipal Streets" cases—all cited in the foregoing brief.

Furthermore, the Interstate Commerce Commission was appealed to by this appellant to determine, in the exercise of its exclusive jurisdiction, whether or not the rule of the railway was in violation of Section 3(1) of the Interstate Commerce Act. The Commission determined on full hearing and consideration that the rule of the carrier was not in violation of the law. In reaching that conclusion it relied upon prior decisions of this Court and stressed the unbroken line of decisions wherein the Commission had dealt with the question of segregation. Despite the pendency of bills in Congress to amend the law so as to ban segregation in interstate commerce, the Congress has not passed such a law. It is not to be supposed that the Congress did not know of the uniform holding by the Ineterstate Commerce Commission from the very year of its creation to date to the effect that segregation, equal facilities being provided, is not a violation of the law. And we might add that the Congress is certainly presumed to have known the decisions of this Court ever since the year 1877 sanctioning such rules and regulations by carriers as violative of no provision of the Constitution or any Act of Congress. If appellant's position is correct, it means that this Court, the lower Federal Courts, the Interstate Commerce Com-

mission, and Congress have all been wrong these many years. The Constitution and the statutes appellant here invokes have been in effect throughout all those years. What, may we ask, has happened to change their meaning patiently and carefully spelled out over the years? If appellant is right, why should bills be introduced in Congress to bring about the very end he here asserts is his right? To ask these questions is to answer them. There is but one answer—the position appellant takes in the case at bar is in error.

We respectfully submit the decision of the District Court should be affirmed.

SIDNEY S. ALDERMAN,
ARTHUR J. DIXON,
CHARLES CLARK,
Attorneys for Appellee,
Southern Railway Company.

APPENDIX A

CHRONOLOGICAL HISTORY

May 17, 1942. Incident giving rise to this litigation.

I. C. C. Docket No. 28895.

Oct. 10, 1942. Complaint filed (R. 80-83).
Feb. 24, 1943. Hearing (R. 86-183).
May 13, 1944. Decision, 258 I. C. C. 413 (R. 184-195).
Sep. 18, 1944. Rehearing denied (R. 195).

No. 2445, U. S. Dist. Court for Dist. of Maryland, Henderson v. U. S., I. C. C., So. Ry. Co. intervener.

Jan. 26, 1945. Suit filed (R. 53-58).
Sep. 24, 1945. Tried before District Court (R. 63).
Dec. 17, 1945. Opinion, 63 F. Supp. 906 (R. 63-79).
Feb. 18, 1946. Decree (R. 79-80).

I. C. C. Docket No. 28895 Reopened.

Oct. 15, 1946. Reheard (R. 196-247).
Sep. 5, 1947. Decision, 269 I. C. C. 73 (R. 4-11).

No. 3829, U. S. Dist. Court for the Dist. of Maryland, Henderson v. U. S. and I. C. C.; Sou. Ry. Co. intervener.

Dec. 11, 1947. Suit filed (R. 1-4).
June 4, 1948. Tried in District Court (R. 17-53).
Sep. 25, 1948. Opinion, 80 F. Supp. 32 (R. 248-260).
Oct. 28, 1948. Decree (R. 265).
Nov. 17, 1948. Appeal allowed (R. 269).

APPENDIX B

49 U.S.C. Sec. 3, par. 1*

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or *cause* any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, *association*, locality, *port, port district, gateway, transit point, region, district, territory,* or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, *association,* locality, *port, port district, gateway, transit point, region, district, territory,* or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.*"

CHAPTER 3.—CIVIL RIGHTS**

8 U.S.C., Section 41

"§ 41. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977."

---

* Original Section 3, 24 Stat. 380 as amended. Italics indicate amendments of August 15, 1935, 49 Stat. 607, and September 18, 1940, 54 Stat. 902.

** Allegations in paragraphs VI and VII of Complaint (R. 82) were withdrawn at first hearing before Interstate Commerce Commission (R. 88-90).

8 U.S.C., Section 43

"§ 43. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979."

CONSTITUTION OF THE UNITED STATES*

Art. 4, § 2, cl. 1

"Section 2. Privileges and Immunities.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

---

* Allegations in paragraph IX of Complaint (R. 82) were withdrawn at first hearing before Interstate Commerce Commission (R. 88-90).

APPENDIX C

(R. 66, 186)

SOUTHERN RAILWAY SYSTEM

Dining Car Regulations

July 3, 1941.

Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them.

APPENDIX D

(R. 66-67, 186)

August 6, 1942.

Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

These tables are not to be used by white passengers until all other seats in the car have been taken, then, if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you.

RESERVED

("Reserved Card")

APPENDIX E

(R. 7-8,223,252)

Washington, D. C., February 19, 1946.

Transportation Department Circular No. 142.

Cancelling Instructions on this subject dated July 3, 1941, and August 6, 1942.

SUBJECT: SEGREGATION OF WHITE AND COLORED PASSENGERS IN DINING CARS.

To: Passenger Conductors and
Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No.2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserve" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946.

APPENDIX F

(R. 179-180)

Rules of the Operating Dept.

Effective August 1, 1923

Conductors:

Rule 1136. They will report for duty at the appointed time and see that their trainmen are on hand. They will have charge of the trains to which they are assigned and of all persons employed thereon. They are responsible for the safe and proper management of such trains, for the protection and care of passengers and property, for performance of duty by the train employes, and for the observance and enforcement of all rules and instructions. They must report all violations of rules and neglect of duty by the train employes to the superintendent or train master.

Rule 1138. They must require members of their crew to be familiar with their duties, and must instruct them, if necessary, in the proper performance of their work and caution them as to its risks.

Rule 1191. They must contribute to the comfort of passengers and give attention to those who are unattended, or those who are ill, infirm, inexperienced or otherwise unable to care for themselves.

Rule 1196. They must require passengers to occupy the cars or the space designated for them and not allow them to occupy places where their safety would be endangered.

Rule 1200. They must not allow drunken or disorderly persons to board the trains, nor allow improper language or disorderly conduct in the cars.

Rule 1201. These regulations must be enforced courteously and quietly but if not observed, the conductor must remove the offender from the train.

APPENDIX G

81st CONGRESS

H. R. 22

IN THE HOUSE OF REPRESENTATIVES

January 3, 1949

MR. POWELL introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce.

A BILL

To amend the Interstate Commerce Act (U.S.C., title 49, sec. 3 (1)), so as to prohibit the segregation of passengers on account of race or color.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Act (U. S. C., title 49, sec. 3 (1)), as amended, be, and the same is hereby, further amended by adding after the period which follows the word "description" the following sentences: "It shall be unlawful to segregate passengers traveling on any instrumentality or facility of carriage, or using any terminal facility, subject to this Act on account of such passengers' race or color. Any such segregation or attempt to segregate by any person or persons subject to this Act shall subject such person or persons to the penalties herinafter provided for violation of this Act."

APPENDIX H.

(R. 169-176)

February 25, 1943.

Elmer W. Henderson v. Southern Railway Co.,

I.C.C. Docket No. 28895.

Mr. W. P. Bartel, Secretary
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

In conformity with permission granted by Examiner upon the hearing of this case on yesterday, we submit for

the record the following references to state laws respecting the handling of passengers of different races:

Code of Alabama, 1940; Title 48-196, et seq.
Florida Statutes, 1941; Section 352.03, et seq.
Code of Georgia, 1933; Section 18-205, et seq.
(Ann. Code of Georgia, 1936; Section 18-205, et seq.)
Dart's Louisiana General Statutes, 1939; Section 8130, et seq.
Mississippi Code, 1930 (1942); Section 6132 (2351,7784), et seq.
Kentucky Revised statutes, 1942(1943); Section 276.440, et seq.
Code of Laws of South Carolina, 1942; Section 8396, et seq.
North Carolina Code of 1939; Section 3494, et seq.
(General Statutes of North Carolina, 1943; Section 60-94, et seq.)
Williams Tennessee Code of 1934; Section 5518, et seq.
Code of Virginia; (1942), Section 3962 et seq., and Section 4007.

And, in respect of conductors' police powers as follows:
Code of Alabama, 1940; Title 48-198.
Florida Statutes, 1941; Section 352.02.
Code of Georgia, 1933; Section 27-213 also Section 18-207.
(Ann. Code of Georgia, 1936; Section 18-205, et seq.)
North Carolina Code of 1939; Section 3483.
(General Statutes of North Carolina, 1943; Section 60-82.)
Code of Laws of South Carolina, 1942; Section 8420.
Code of Virginia; Section 3944.

Yours very truly,

Charles Clark.
A. J. Dixon.
Attorneys for Defendant.

Copy to—

Mr. Horace W. Johnson, Examiner, Interstate Commerce Commission, Washington, D. C.
Mr. Belford V. Lawson, Jr., 2001 11th St. N.W., Washington, D. C.

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No. 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILWAY CO., *Appellees*.

On Appeal from the United States District Court for the District of Maryland.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

ROBERT J. SILBERSTEIN,
Executive Secretary,
National Lawyers Guild.

MOZART G. RATNER,
RUTH WEYAND,
Counsel for Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 25.

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILWAY CO., *Appellees*.

On Appeal from the United States District Court for the District of Maryland.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

The National Lawyers Guild respectfully prays leave to file a brief as amicus curiae in the above captioned case. The applicant has filed with the clerk the written consent of counsel for appellant and for all of the appellees except the Southern Railway Company who though requested refused to give his consent.

The National Lawyers Guild is an organization of members of the American bar, devoted particularly to the protection of the fundamental civil rights guaranteed by the Constitution of the United States. It believes that the question presented in this case probes the very essence of those rights. It further believes that the concept upon which the judgment below rests is at odds with the letter, no less than with the spirit of our Constitution. The effect of that concept—the division of our democracy along racial lines—threatens not alone the civil rights of all minority groups, but the security of democratic institutions. The National Lawyers Guild conceives it to be its public duty, as an organization of members of the bar, to bring before this Court the reasons which impel its conclusion that the judgment below should be reversed. It therefore respectfully requests leave to file a brief as amicus curiae.

BRIEF OF THE LAWYERS GUILD AS AMICUS CURIAE.

OPINIONS BELOW.

The opinions of the United States District Court for the District of Maryland (R. 63, 248) are reported in 63 F. Supp. 906 and 80 F. Supp. 32.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 7253 of the Judicial Code, 28 U.S.C. Sec. 1253.

QUESTION PRESENTED.

This brief will discuss only the question whether, by approving and supporting the segregation of passengers on the basis of race alone in the dining car of an interstate rail carrier so as to prevent appellant, solely because of his race, from being seated and obtaining service at a vacant table of his choice, the Interstate Commerce Commission has infringed rights guaranteed appellant by the Interstate Commerce Act and the Fifth Amendment.

STATEMENT.

On May 17, 1942, appellant, a Negro, travelling from Washington, D. C., to Atlanta, Georgia, as a first class passenger on a train of the Southern Railway Company, was refused service in the dining car of the train solely because of his race. By regulation of the carrier two tables in the dining car were allegedly reserved for Negro passengers. However, when appellant first applied for service several of the seats at these two tables were occupied by white passengers and for this reason appellant was refused service at any of the vacant seats at these tables. Although seats at other tables in the dining car were va-

cant appellant was refused service at any of those tables because of his race.

The Interstate Commerce Commission, on complaint of appellant, found that appellant had been subjected unlawfully to undue and unreasonable prejudice and discrimination because of his race, but concluded that the entry of an order prohibiting such prejudicial discrimination in the future would serve no useful purpose, and dismissed the complaint.

The District Court for the District of Maryland set aside the Commission's order and remanded the case to the Commission. It held that the carrier's regulation which the Commission had approved and adopted and thereby, in effect, made its own, was invalid insofar as it authorized the seating of white passengers at tables reserved for colored passengers but did not authorize the seating of colored passengers at tables reserved for white passengers.

Thereafter, Southern Railway promulgated new regulations (R. 233), setting aside one table in each dining car for the use of colored passengers exclusively and the remaining tables for white passengers exclusively. The table reserved for colored passengers is located next to the kitchen, opposite the steward's office, and is separated from the body of the dining car by a five foot wooden partition. On rehearing pursuant to the remand the Commission found that in consideration of the anticipated proportion of white to colored passengers, the allocation of one table exclusively to colored passengers and the remainder exclusively to white passengers "provided an equitable and reasonable division between the races of its available dining car space."

The District Court, Judge Soper dissenting, affirmed. It summarized its conclusions as follows: Substantial inequality of treatment between Negro and other passengers on interstate carriers is forbidden by the Interstate Commerce Act and the Fifth Amendment. Segregation of passengers in dining cars by race alone, however, does not amount to

substantial inequality of treatment. Since segregation as such is not forbidden the inevitable consequences of segregation cannot be deemed to result in substantial inequality of treatment. Therefore, the fact that pursuant to the Railway's amended regulation, which the Commission approved, passengers are denied seating and service in dining cars solely because of their race—a denial which would occur whenever all seats in one section or another were occupied while seats in the section closed to persons of the particular passenger's race were vacant—may not be deemed to bring the regulation into conflict with the Act or the Constitution. To hold otherwise, said the court, "denies the very premise from which we start, namely that racial segregation is not, per se, unconstitutional." For the same reason the court held that no objection could be taken to the Commission's method of enforcing segregation, i. e., by separating the table to be used by Negroes from the remainder of the dining car by a wooden partition. The court said that "The same applies also to the location of the table allotted to colored passengers * * * at the end of the dining car, directly opposite the space newly provided for the steward's office. The undesirability of this location compared with that of tables in other parts of the dining car from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think non-existent."

Appellant, having throughout the proceedings challenged the Railroad's regulations insofar as they require segregation of white and colored passengers in dining cars, on the ground that their enforcement violates rights guaranteed him by the Interstate Commerce Act and the Fifth Amendment, presses these contentions on this appeal.

ARGUMENT.

I. The Nature of the Issue.

The central issue in this case arises out of a conflict between two inherently irreconcilable doctrines both heretofore enunciated by this Court. One, the so called "separate but equal" doctrine, holds that racial segregation by government fiat is *per se*, compatible with the equal protection clause of the Fourteenth Amendment, and with the due process clause of the Fifth Amendment. The other, to which this Court has adhered increasingly in recent years, holds that race, as such, is constitutionally an irrelevance and that governmental classification based on race alone is unreasonable, invidious and therefore prohibited by the Fifth and Fourteenth Amendments. Under this doctrine only when loyalty to a race may reasonably be deemed incompatible with loyalty to the United States may a classification in terms of race survive. *Hirabayashi v. United States*, 320 U. S. 81, 100-102; *Ex Parte Endo*, 323 U. S. 283, 297, 302. Since the racial segregation here in issue requires classification on the basis of race, and since no claim is even advanced that such segregation is warranted by potential disloyalty of either race to the United States, one doctrine or the other cannot survive this case.

We think it clear that the issue thus posed is squarely presented in this case, despite the fact that the compulsory segregation here attacked was initiated not by a governmental agency itself but by the Railroad. In the first place, as this Court held in the *Restrictive Covenant Cases*, 334 U. S. 1, 20, the constitutional guaranties of equal protection and due process are not "ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement" or a private regulation. Here, as the court below recognized, the Railroad's regulation requiring segregation in dining cars was approved and adopted by the Interstate Commerce Commission as its own, and given

the status of a governmental regulation having the force of law. Such conduct by the Commission must comport with the Fifth Amendment.

Secondly, the Railroad itself, in promulgating regulations concerning service on its trains, does not act as a private individual whose discriminatory conduct, under the *Civil Rights Cases*, 109 U. S. 3, 17, is beyond the scope of constitutional limitations. As a public carrier the railroad is vested by Congress with duties, powers and privileges over interstate travel which necessarily must be exercised consistently with the Fifth Amendment. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 198; *Marsh* v. *Alabama*, 326 U. S. 501, 506; *United States* v. *Classic*, 313 U. S. 299, 326; *Smith* v. *Allwright*, 321 U. S. 649, 663. In dealing with interstate rail carriers Congress did not leave implicit, as it did in the *Steele* case, the duty to conform to those fundamental standards of due process, including the concept of equal protection of the laws, which bind both federal and state legislatures. In Section 3 (1) of the Interstate Commerce Act (49 U.S.C. 3(1)), Congress provided that "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * in any respect whatsoever; or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *." That this formulation of the carrier's obligation is equivalent to the formulation of the duty to accord due process and equal protection contained in the Fourteenth Amendment has been affirmed by this court. *Mitchell* v. *United States*, 313 U. S. 80, 94. It follows, as the Court below assumed, that the compulsory segregation regulation here in issue can be deemed to comport with Section 3(1) of the Interstate Commerce Act only if compulsory segregation under the circumstances here presented, if undertaken by a state in relation to a state owned carrier could be deemed compatible with the Fourteenth

Amendment. Since only the "separate but equal" doctrine stands in the path of recognition that governmental segregation of individuals solely on the basis of race does violate the fundamental guarantees of due process and equal protection, the fate of that doctrine is inevitably before the Court.

II. The "Separate But Equal" Doctrine is Unsound.

The "separate but equal" doctrine has never been reconsidered by this Court since *Plessy* v. *Ferguson*, 163 U. S. 537, decided in 1896, injected it into the Constitution.[1] True, the doctrine has been applied in a number of cases,[2] but these reflect merely *stare decisis*, not independent approval based upon reevaluation by the Court of the premises and reasoning upon which the doctrine rests. As we shall show, *infra*, pp. 19-25, this Court, without purporting to disturb the doctrine, has repeatedly rejected the very premises upon which it is founded. Under these circumstances continued application of the doctrine is as anomalous as the doctrine itself.

A. The "separate but equal" doctrine is a product of fallacious reasoning and an improper approach to the requirements of the Fourteenth Amendment.

It is to be observed at the outset that the Court in *Plessy* v. *Ferguson* did not reason from the requirements of due process and equal protection to the conclusion that a classification based on race alone was permissible. Instead, it assumed the very conclusion in issue, *i.e.*, that racial segregation is a reasonable and permissible legislative end, and from that conclusion reasoned that the due process and equal protection clauses may not be deemed to invalidate

[1] See Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219, 254, 256, 263, 283 (1946); Note, *Is Racial Segregation Consistent with Equal Protection of the Laws? Plessy* v. *Ferguson Reexamined*, 49 Col. L. Rev. 629 (1949).

[2] See, *e. g.*, *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 160; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 395; *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337, 344; *Gong Lum* v. *Rice*, 275 U. S. 78, 85-86.

classification in terms of race which is indispensable to the achievement of that objective. Faced then with the necessity of giving some effect to the equal protection and due process clauses in a society segregated racially by law, the Court concluded that these requirements were met by affording to members of one race facilities or accommodations "equal" to those afforded the others.

Only three considerations were advanced by the Court to support its assumption that governmental segregation in terms of race is reasonable and therefore compatible with the Fourteenth Amendment. The first consideration, which was relied upon by the Court to distinguish segregation by color of skin, from segregation by color of hair, or nationality, or citizenship was that racial segregation comports with "the established usages, customs and traditions of the people" (163 U. S. at pp. 549-550). But if established customs and usages were themselves sufficient to sustain the reasonableness of classification in terms of race what becomes of the Court's assertion in *Strauder* v. *West Virginia*, 100 U. S. 303, 306, 307, that the Fourteenth Amendment can not be evaded by laws enacted to perpetuate distinctions which existed prior to its adoption. As the Court stated: "it required little knowledge of human nature to anticipate that those who have long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed". It would seem that a state law requiring segregation of the Negro from the white race, if not condemned by the fact that it was enacted "to perpetuate the distinctions that had before existed," is certainly not justified thereby.

The second consideration advanced by the Court was that state legislatures must be at liberty to act to promote the "comfort" of the people and to take steps to preserve the "public peace and good order." 163 U. S. at p. 550.

Significantly, no evidence whatever was referred to by the Court to support its assumption that the "comfort" of members of either race, as distinguished from the racial prejudices of individuals, could reasonably be thought to be promoted by enforced racial segregation. Nor did the Court disclose any factual basis for its assumption that "peace and good order" could be promoted thereby. But, this defect aside, the Court's approach erroneously assumes that the fundamental rights guaranteed by the Fourteenth Amendment are subordinate to state police power, not limitations upon it. This assumption survives today nowhere in our law. It has been expressly repudiated even where urged in support of ordinances requiring racial segregation. As the Court said in *Buchanan* v. *Warley*, 245 U. S. 60, 74, "the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution." To suggest that a particular measure finds support in the police power does not determine whether specific constitutional limitations prohibit its adoption and enforcement. Indeed, *Buchanan* v. *Warley*, 245 U. S. 60, repudiated the very notion upon which the Court relied in *Plessy* v. *Ferguson*, *i. e.*, that promotion of public peace by preventing race conflicts may constitutionally be attained by compulsory racial segregation. "It is urged," said the Court in *Buchanan* v. *Warley* (245 U. S. at p. 81), "that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

The third consideration suggested by the Court in the *Plessy* case was that the Fourteenth Amendment (163 U. S. at p. 544), "in the nature of things * * * could not have been intended to abolish distinction based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory

to either." For, said the Court (163 U. S. at pp. 551-552), "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences * * *. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

The Court's assumption that the Fourteenth Amendment must have been intended to secure equality to the Negro race only in the field of so called "civil and political rights" is a distortion of the *Civil Rights Cases*, 109 U. S. 3, in which a distinction between "social rights" and "political" or "civil" rights was first suggested. In the *Civil Rights Cases* that distinction was made to indicate the difference between the character of rights protected by the Thirteenth Amendment and those protected by the Fourteenth. The Thirteenth Amendment, said the Court, was designed to secure only "those fundamental rights which are the essence of civil freedom", not "what may be called the social rights of men and races in the community" (109 U. S. at p. 22). The latter class of rights, the Court assumed, were intended to be protected by the Fourteenth Amendment (109 U. S. at pp. 19, 21). "Many wrongs", said the Court "may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery * * *. What is called *class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment*, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not *to distinctions of race, or class or color*, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws" (109 U. S. at pp. 23-24, see also p. 25, italics added).

For the Court's conclusion in the *Civil Rights Cases* that statutes distinguishing between persons on the basis of race, while not tending to reimpose slavery, would deny equal protection of the laws, the Court in the *Plessy* case substituted an entirely different conclusion (163 U. S. at p. 543), that "A statute which implies merely a legal distinction between the white and colored races * * * has *no tendency to destroy the legal equality of the two races*, or establish a state of involuntary servitude" (Italics added).

This erroneous construction of the *Civil Rights Cases* was again set forth in *Buchanan* v. *Warley*, 245 U. S. 60, 79. There, speaking of the Fourteenth Amendment as well as the Thirteenth, the Court said: "These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."

On the merits, such a conclusion concerning the scope of the Fourteenth Amendment cannot bear even superficial scrutiny. In the first place, if so called "social rights" are not protected by the Fourteenth Amendment, why is a state not free to deny to colored persons benefits and privileges which it accords to white persons? If only "social rights" are involved in laws regulating such matters as transportation, accommodations in inns, etc., by what warrant does the Court require the states to provide "equal" facilities for the white and colored races? If the states are not precluded by the Fourteenth Amendment from recognizing an assumed "social" inferiority of the Negro race, it would follow that the states could require that, compatibly with their inferior social status, colored persons be allotted facilities in the "social sphere" inferior to those allotted white persons. The Court's own recognition in the *Plessy* case that a state may not constitutionally accord benefits or facilities of any kind to members of one race inferior to those accorded members of the other

suffices to refute the proposition that there is a field of "social rights" to which the prohibitions of the Fourteenth Amendment against racial discrimination by law does not apply.

Secondly, evidence of the very nature advanced by the Court in the *Civil Rights Cases* to show that the Thirteenth Amendment was not intended to protect so-called "social rights", demonstrates that the Fourteenth Amendment was. In that case (109 U. S. at p. 22) the Court regarded the fact that the Civil Rights Bill of 1866 (14 Stat. 27), passed after enactment of the Thirteenth Amendment but before enactment of the Fourteenth Amendment, undertook to protect only such "fundamental rights" as the "right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey real property," as an authoritative indication that the protection of the Thirteenth Amendment extended only to rights of that character. By parity of reasoning, the fact that the Civil Rights Act of 1875 (18 Stat. 335), enacted after adoption of the Fourteenth Amendment, undertook to protect the right to equal accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, demonstrates that these rights were the subject of the Fourteenth Amendment.

Third, and conclusive, is the fact noted in *Strauder* v. *West Virginia*, 100 U. S. 303, 310 that "The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible." The very terms of the Fourteenth Amendment leave no room for any distinction between "civil and political" rights and "social" rights. "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States *shall be the same* for the black as for the white; that all persons, whether colored or white, shall

stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" (100 U. S. at p. 307, italics added).

By indulging the fallacious assumption that so called "social rights" are not protected by the Fourteenth Amendment, the Court in the *Plessy* case was able to evade entirely the critical fact that even a law "which implies merely a legal distinction between the white and colored races" (163 U. S. at p. 543) is a "law" within the meaning of the equal protection and due process clauses and that it must therefore be "the same" (*Strauder* case, 100 U. S. at p. 307) for one as for the other. Of course, for the Court in the *Plessy* case to have faced that fact would be to condemn the law, for there is no escape from the proposition, recognized in the *Civil Rights cases*, 109 U. S. 3, 24, as well as in *Strauder* v. *West Virginia*, 100 U. S. 303, 307, that "class legislation" embodying "distinctions of race * * * or color" is *per se* discriminatory and denies equal protection of the laws. A law which denies anything to the members of the Negro race which it grants to members of the white race cannot possibly be said to be "the same" for both, even though the same law may grant something else to the Negro race which it denies to the white race.

Moreover, by taking as its reference "the nature of things", rather than the terms of the Fourteenth Amendment, the Court in the *Plessy* case (16 U. S. at p. 544) was able to escape notice of the equally critical fact that, whatever may be said of its effect upon "social equality", compulsory segregation is an infringement of liberty. The language of the Fourteenth Amendment, said the Court in the *Strauder* case (100 U. S. at p. 310), "is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property. Any state action that denies this immunity to a

colored man is in conflict with the Constitution." The Fourteenth Amendment does not place the right to "liberty" on a different plane than the right to own or acquire property. The fact that segregation laws infringe liberty could not have been faced without condemning the law. For the *Strauder* case had made it clear that any law which restrained the liberty of any person on the ground of race alone *per se* infringed the immunity conferred by the Fourteenth Amendment.

The assumption of the Court in the *Plessy* case that segregation by law must necessarily be permissible because segregation is voluntarily practiced by individuals and "Legislation is powerless to eradicate racial instincts" (163 U. S. at p. 551) is likewise a distortion of the *Civil Rights Cases*. The whole point of the *Civil Rights Cases* was that the Fourteenth Amendment did not undertake to prohibit the practice by individuals of the very racial discrimination which was prohibited to the states. To assert that because individuals are free to discriminate on the basis of race the states must likewise be free to do so; that, indeed, the states may require this even of unwilling individuals, is to throw the *Civil Rights Cases* to the winds.

In the *Restrictive Covenant Cases*, 334 U. S. 1, this Court disposed of the notion that a state is left free by the Fourteenth Amendment to take cognizance of the "racial instincts" of its citizens in the formulation or enforcement of its laws.[3] There the contention was pressed that the states must be free to enforce restrictive covenants because such private covenants were manifestations of "racial instincts" which private persons could lawfully indulge. To that this Court replied (334 U. S. at p. 19):

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving

[3] It is significant that a number of state court cases upholding the enforcement of restrictive covenants against attacks based on the Fourteenth Amendment relied on the *Plessy* case. *Meade* v. *Dennistone*, 173 Md. 358, 196 Atl. 330; *Parmalee* v. *Morris*, 218 Mich. 625, 188 N. W. 330; *Kochler* v. *Rowland*, 275 Mo. 573, 205 S. W. 217.

> private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny * * *, on the grounds of race or color, the enjoyment of property rights * * *. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Regulations requiring segregation in public carriers on the basis of race, when authorized by either the states or the federal government, stand in no better position than judicial enforcement of restrictive covenants. Those regulations do not leave private individuals, the respective passengers, "free to impose such discrimination as they see fit" (334 U. S. at p. 19). Rather, the regulations operate to deprive passengers of both races who desire to associate together of the liberty of doing so. In this respect "the coercive power of government" (334 U. S. at p. 19) operates precisely as it did in the *Restrictive Covenant Cases* when it prevented a willing white vendor from selling his property to a Negro purchaser.

Moreover, just as in the *Restrictive Covenant Cases*, prohibition against judicial enforcement did not compel private individuals to refrain from racial discrimination in disposing of their property, so prohibition of compulsory segregation would not compel "commingling of the two races upon terms unsatisfactory to either" (163 U.S. at p. 544). Just as home owners who object to residing next door to members of another race are free on that account to move, so passengers who do not wish to be seated and served at a table adjacent to that occupied by a person of another race are not compelled to be or remain seated there. Passengers can no more demand of the law, however, that it prevent persons of other races from being seated at any vacant table of their choice in public dining cars, than they can de-

mand that it prevent persons of other races from residing in houses adjacent to their own.

The second aspect of the "separate but equal" doctrine, that as long as "equal" facilities are offered members of the two races the equal protection clause is satisfied, rests also upon fallacious premises. In the first place, the Court's assertion in the *Plessy* case (163 U.S. at p. 551), that as long as equal facilities are provided in a statute requiring segregation the statute cannot be deemed to stamp "the colored race with a badge of inferiority," rests upon a presumption, not upon the facts. As Mr. Justice Harlan pointed out in his dissenting opinion (163 U.S. at p. 557), "The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary." The majority opinion avoided this difficulty by indulging a conclusive presumption that guise and reality were one and the same. Such an approach toward the constitutionality of legislation which distinguishes on the basis of race, color or creed, has, in recent years, been discarded by this Court. Even the usual presumption of constitutionality does not bar independent investigation where statutes are claimed to invade fundamental rights guaranteed by the Constitution. *Schneider* v. *State*, 308 U.S. 147, 161; *Thomas* v. *Collins*, 323 U.S. 516, 529-531. Particularly is that true where claim is made that a particular statute which makes classification turn upon race, is the product of prejudice against "racial minorities." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4. Today such a statute is subjected to the "most rigid scrutiny". *Korematsu* v. *United States*, 323 U.S. 214, 216. Had such scrutiny been given to the ordinance involved in the *Plessy* case it could not have failed to reveal that which Mr. Justice Harlan thought no one could with candor deny. Compulsory racial segregation was and is no more directed against members of the white

majority than was judicial enforcement of restrictive covenants. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 22.

Secondly, the Court's premise in the *Plessy* case that "equal" treatment could be accorded members of both races on a segregated basis, is, and has been demonstrated to be, false. If nothing else, the fact that the Negro race is a minority as compared with the white race would itself require that the facilities accorded to the one be fewer than those accorded to the other. But the Constitution speaks of equality, not proportionate equality. Beyond that, the fact that no two sets of facilities are ever precisely "equal" in all respects, would of necessity require, and it has in practice required, modification of the doctrine so that it becomes "separate, but substantially equal". This is the actual doctrine as applied by the Commission in the instant case. It is precisely because segregation on the basis of race is in practice impossible if the facilities accorded to members of the two races must be "equal", that the Commission and the Court below in this case could give no weight to the disparity inherent in the fact that the table assigned to Negroes is separated from the remainder of the car by a wooden partition, whereas no table assigned to white passengers is so separated, and that the table assigned to Negroes is by virtue of its location less desirable than the others by ordinary standards of human choice. Complete equality of facilities and segregation can co-exist only in fiction and not in fact. An objective comparison of the separate facilities for whites and Negroes held to be "substantially equal" in the state court cases purporting to follow *Plessy* illustrates the wide discrepancies in the treatment of the two groups which have in practice received judicial approval under the doctrine of that case.[4] If, as the Court assumed in the *Plessy* case, complete equality of facilities is the minimal requirement of the equal protection clause the doctrine itself must be discarded.

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[4] *e. g. Dameron* v. *Bayless*, 14 Ariz. 180, 126 Pac. 273; *Patterson* v. *Taylor*, 51 Fla. 275, 40 So. 493; *Reynolds* v. *Board of Education*, 66 Kan. 672, 72 Pac. 274; *Chiles* v. *Chesapeake & O. R. Co.*, 125 Ky. 299, 101 S. W. 386; *Tucker* v. *Blease*, 97 S. C. 303, 81 S. E. 668.

But even on the assumption that absolute equality of facilities is possible, and that such absolute equality could be achieved, for example, by assigning one entire side of a dining car to Negro passengers and the other side to white passengers, the real vice of the doctrine would remain. Dividing a dining car in half, and assigning one half exclusively to white passengers and the other exclusively to Negro passengers is, in principle, no different than dividing a residential block in half, and assigning one half for white and the other half for Negro occupancy. That, as this Court held in *Buchanan* v. *Warley*, 245 U. S. 60, the Fourteenth Amendment will not permit a state to do. The "separate but equal" doctrine, we submit, can no more constitutionally be applied in the one case than in the other.

B. "Separate but equal", as Constitutional dogma, is a contradiction in terms.

The basic fallacy in the thesis that compulsory segregation accords "equal protection", if only the treatment accorded each race is parallel was exposed by this Court in *Shelley* v. *Kraemer*, 334 U. S. 1, 22. There it was held that the imposition of identical limitations upon members of both races, far from amounting to "equal protection," constituted an "indiscriminate imposition of inequities."

In that case it was urged that no denial of equal protection could possibly be thought to inhere in judicial enforcement of restrictive covenants against colored purchasers, since the law would apply equally to enforce restrictive covenants against white purchasers. The answer given by the Court in that case is equally applicable here, where it is urged that the liberty of white passengers to sit at tables reserved for Negro passengers is limited equally with the liberty of Negro passengers to sit at tables reserved for white passengers. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to

say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color" (334 U. S. at p. 22).

What the Court in the *Plessy* case failed to observe was that a law which did no more than restrict colored passengers to particular tables in a dining car, without making provision at all for the remaining tables would unquestionably deprive colored passengers of equal protection of the laws, regardless of how desirable, or how "equal" the facilities allotted to colored passengers were as compared to the remaining facilities. Adding to such a law a restriction against the use by white passengers of tables reserved for colored passengers could not possibly remove the illegality of the restriction upon colored passengers. It would, at most, impose an equally illegal restriction upon white passengers.

This critical flaw in the "separate but equal" doctrine has led the Court to deny it application in every case where the denial of liberty inherent in compulsory racial segregation could not be disguised by the label "social rights." *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704; *Shelley* v. *Kraemer*, 334 U. S. 1. The *Buchanan* case did not invalidate the segregation ordinance there involved on the ground that the residential opportunities afforded by it to colored persons were "unequal" in any sense to those allotted to white persons. Indeed, nowhere in the opinion did the Court even examine the question whether the areas restricted to colored occupancy were "equal" or unequal to those restricted to white occupancy. Instead, the Court pointed out that the ordinance was fatally defective because it deprived both white persons and colored persons of the liberty of disposing of their property to members of another race.

While the Court in the *Buchanan* case attempted to distinguish it from *Plessy*, the distinction advanced does not bear scrutiny. Thus, of *Plessy* it was said (245 U. S. 60,

79), that there was "no attempt to deprive persons of color of transportation in the coaches of the public carriers, and the express requirements were for equal though separate accommodations for the white and colored races. In *Plessy* v. *Ferguson*, classification of accommodation was permitted upon the basis of equality for both races." But there was no more an attempt in the *Buchanan* case to deprive persons of color of the right to dispose of their property, as such, than there was in *Plessy* an attempt to deprive them of transportation, as such. In the one case what was done was to limit by law the available class of purchasers to whom Negroes were at liberty to sell their property. In the other case what was done was to limit the available class of accommodations which Negroes were at liberty to seek. The restriction to a particular class of facilities was no more and no less "equal" in the one case than was the restriction to a particular class of purchasers in the other. Since the identical basis of "equality for both races," was present in both cases there existed no justification for upholding segregation in the one case that was not present in the other.

Whatever may have been true in 1917, it is today too late to distinguish between *Buchanan* and *Plessy* on the ground that the one touches property whereas the other touches personal rights. This Court has repeatedly recognized that the rights which have highest priority in our Constitutional scheme are personal rights, not property rights. See, *e.g.*, *Thomas* v. *Collins*, 323 U. S. 516, 529-532; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Marsh* v. *Alabama*, 326 U. S. 501, 509. While of course this does not mean that personal liberties are absolute, it certainly does mean that limitations cannot be imposed upon them for any reasons short of those which would warrant limitations upon the exercise of property rights.

A state may undoubtedly make reasonable regulations concerning the sale by an owner of his real property. It may even restrict the uses to which such property may be put. So too, a state and the federal government may make

reasonable regulations concerning seating in public conveyances, including the dining cars of trains. But the requirement of "reasonableness", which necessarily prohibits racial distinction, is as applicable in the case of regulation of the use of realty as in the regulation of seating in dining cars; just as one is a limitation on "property rights" so is the other a limitation on "personal rights." The right of a railroad passenger to be unhampered by unreasonable rules in selecting a seat and securing service in a railroad dining car is no less clear than the right of a Jehovah's Witness to approach the doors of householders for the purpose of conveying a message. See *Marsh* v. *Alabama, supra; Martin* v. *Struthers*, 319 U. S. 141, 146-147. The liberty of two passengers, members of different races, to sit and be served together on railroad dining cars can no more constitutionally be impaired than can the right of a Jehovah's Witness to proselytize for his sect at the home of a willing listener.

Liberty under the Fourteenth Amendment is the rule, not the exception. The Constitution does not speak of great liberties and small ones. Whenever government undertakes to confine individual liberty, no matter how great or how minor the confinement may be, the regulation must be justified by the same test of reasonableness. On that test, a "first come first served" rule may well be applied to limit the liberty of passengers to select seats in a dining car, just as a zoning ordinance may well be applied to the liberty of a property owner to erect a slaughterhouse in a residential neighborhood. But the test is the same, and if racial distinctions cannot be made to limit the liberty of the property owner, they cannot be made to limit the liberty of a railroad passenger.

Moreover, the quest for "equality" in terms of facilities accorded or limitations imposed ignores the fact that segregation does deny equality of valuation of human beings as such. It has been said that behind all "senses of equality, * * * lies the fact of individual self-consciousness and the consequent universal if vague demand for equality of

personal valuation."[5] To exclude this concept of "equality" of human personality from the meaning of the Fourteenth Amendment, which dealt with the very issue of "personal valuation", is to rob the Amendment of its intrinsic meaning. This Court has refused to do so, as is evident from its description of the rights guaranteed by the equal protection clause as "personal rights." Personal rights are those which are guaranteed each person because he is a human being. Unless, as to these rights, persons are treated alike as human beings equal protection is denied. Equal protection in this sense is obviously denied as the Court recognized in the *Strauder* case (100 U. S. at p. 307), if race, color or creed are permitted to make a difference.

C. The consequences of the "separate but equal" doctrine condemn it.

The basic premise of the *Plessy* case, that compulsory racial segregation is *per se* a constitutional exercise of state power, and that a state does not run afoul of the Fourteenth Amendment unless it imposes burdens on one race that it does not impose on the other, or allots benefits to one that it does not allot to the other, carries within itself implications which require its rejection.

For one thing, as the Court recognized in the *Plessy* case, the power to enforce racial segregation "obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person" (163 U. S. at p. 549). It is common knowledge that no one can, by mere observation, correctly so classify every person. Under these circumstances, since a state may use all reasonable means to effectuate its legitimate policies, would anything stand in the way of a requirement that all persons who know themselves to be members of the Negro race must identify themselves as such while travelling on trains by wearing a black arm band? Under

[5] Brinton, Crane, *Equality*, 5 Encyclopedia of Social Sciences, (1931), p. 579.

the "separate but equal" doctrine the Interstate Commerce Commission could certainly approve such a regulation, provided only that it was accompanied by a requirement that all white persons display white arm bands.

A requirement that colored persons wear colored arm bands and white persons white arm bands would not, moreover, have to be limited to passengers on trains. Since the doctrine has its genesis in "social relations", a requirement of self-identification as to race might be enforced by a state on all occasions when members of the two races might come into contact; on the streets, in stores, in polling places and in the jury box.

Nor is that all. If diminishing contact between the races is a legitimate objective of the police power, why may not a state, as Justice Harlan asked (163 U. S. at p. 557), "so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other?" Surely it is no answer that such a regulation would find no precedent in custom and usage. Few principles are better settled than that state police power is not confined to previously established codes and standards, and that the states are free to experiment with novel means of effectuating legitimate ends.

III. Compulsory Racial Segregation is Unconstitutional.

The anomalous "separate but equal" doctrine aside, there can be no question but that the carrier's rule violates the Interstate Commerce Act, and that its approval by the Commission violates the Fifth Amendment. Whenever this Court has considered the effect of the Fourteenth Amendment apart from the limitations of the "separate but equal" doctrine it has recognized that legislative classifications, for whatever purpose made, if based on race alone, are irrelevant, discriminatory, and therefore deny equal protection of the laws. As this Court said in *Hirabayashi v. United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are

founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection." As Mr. Justice Jackson put it, concurring in *Edwards* v. *California*, 314 U. S. 160, 185: race, creed or color "is a neutral fact-constitutionally an irrelevance."

The constitutional presumption that race and color are irrelevant to any proper object of legislation applies to all races and colors. But that it applies most strongly to classifications which distinguish the Negro race from the white race is self-evident, for it was primarily for the protection of the colored people that the amendment was designed.

As *Hirabayashi* holds, it is only with respect to those facts and circumstances which are "relevant to measures for our national defense and for the successful prosecution of the war" that Government may take into account matters "which may in fact place citizens of one ancestry in a different category from others" (320 U. S. at p. 100). Needless to say, no facts and circumstances are here shown which in any respect warrant placing Negro citizens in a different category than others. It follows here, as in the *Steele* case, that the distinctions "based on race alone are obviously irrelevant and invidious." *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203.

Racial segregation in railroad dining cars, as we have shown, restricts the liberty, and therefore the "civil rights" of colored as well as white citizens, no less than did the racial segregation condemned in the *Buchanan* and *Restrictive Covenant* cases. "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Korematsu* v. *United States*, 323 U. S. 214, 216. The restrictions here imposed on both groups cannot stand, for no "pressing public necessity" is even suggested in excuse for them. Indeed, not even an allegation that segregation is necessary to avoid race conflicts could rationally be made in defense of compulsory segregation in railroad dining cars. However, even if there were such a danger this would certainly not amount to "pressing public

necessity" under the *Korematsu* rule. As *Buchanan* v. *Warley*, 245 U. S. 60, 81, held, dangers of that kind cannot constitutionally be met by compulsory racial segregation. To approve segregation on this ground would be to bow to "racial antagonism". And while "Pressing public necessity may sometimes justify the existence of such restriction; racial antagonism never can." *Korematsu* case, 323 U. S. at p. 216.

CONCLUSION.

This brief is limited to an analysis of the relevant legal principles. We believe this analysis shows that the judgment of the court below should be reversed and that the fallacious "separate but equal" doctrine should be eliminated from our law. Other briefs before this Court present social data which convincingly demonstrate the cruel and inhuman results which inevitably flow from racial segregation. We have here dealt with only legal principles, because we feel they compel the correct result. We heartily commend to the Court, however, a full consideration of the realities of "Jim Crow" practices.

We believe anyone who has ever viewed the process of separation of the races as applied to any minority race, carried out with the coercive power of government ever available to punish any deviation, knows the sight is incompatible with the principles upon which our government is founded. Until such daily scenes are erased from our land, the Constitution and its amendments remain for all real purposes a dead letter to those participating.

The instant case affords a splendid opportunity for decreeing that governmental sanction may no longer be used to compel racial separation. We urge the Court to so hold.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY,

Appellees

MOTION FOR LEAVE TO FILE BRIEF and BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PHINEAS INDRITZ,
E. LEWIS FERRELL,
SAMUEL I. HENDLER,
WALTER C. REDFIELD,
Attorneys for American Veterans Committee Amicus Curiae

OCTOBER 12, 1949,
Washington, D. C.

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HENDERSON v. UNITED STATES, et al

OCTOBER TERM, 1949

No. 25

MOTION FOR LEAVE TO FILE BRIEF
Amicus Curiae

The American Veterans Committee, Inc. (AVC) respectfully moves this Court for leave to file the annexed *amicus curiae* brief. The appellant and two of the appellees (the United States and the Interstate Commerce Commission) have consented to the filing of this brief. The other appellee (Southern Railway Company) has refused to consent to the filing of an *amicus* brief by AVC. We have filed with the Clerk of this Court the letters from the Appellant's attorney, from the Solicitor General of the United States, and from the Chief Counsel of the Interstate Commerce Commission granting consent, and a letter from the General Attorney of the Southern Railway Company refusing consent.

This case involves the validity of a regulation of the Southern Railway Company, approved and sanctioned by the Interstate Commerce Commission, which allocates, in the railroad's dining car, one table for the exclusive use of colored people and ten tables for the exclusive use of white people, and places the "colored" table behind a half-concealing wooden partition and near the kitchen and the steward's office. *Henderson* v. *I. C. C.*, 80 F. Supp. 32, 35 (D. C., D. Md., 1948); *Henderson* v. *Southern Railway Co.*, 269 I. C. C. 73, 75 (1947); R. 201, 223, 252, 7.

The American Veterans Committee, Inc. (AVC) is an organization of veterans of World War II associated, regardless of national origin, creed or color, to promote the democratic principles for which they fought, including the elimination of racial discrimination.[1] AVC has a direct interest in the abolition of the regulation here involved because it affects personally not only those of AVC's members who are colored, but also AVC's white members when travelling in mixed groups. But more, AVC believes that this regulation, which perpetuates an unjustifiable and ostentatious racial discrimination, is inconsistent with the ideals of our country and tends to frustrate the objectives for which we fought in World War II. Most of us served overseas. There was no "community pattern" of racial discrimination and segregation when the chips were down and there was only the mud, the foxholes, and the dangers of the ocean and of mortal battle in the fight to preserve our Nation's way of life. One of the major aims of the United States and the allied nations was the defeat of the Nazi and fascist philosophy of racism. The regulation here involved is of the same cloth as that racism. As American citizens and veterans who fought and bled in World War II to eliminate that racism, we continue to oppose it in civilian affairs in order to prevent its becoming a catalyst for another World War.

AVC believes that the right to be free from the discrimination which this regulation imposes in transportation is an integral portion of the great right of freedom from racial discrimination which this Court has previously vindicated

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[1] AVC's *amicus curiae* briefs in the following recent civil rights cases before this Court are illustrative of AVC's views: *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *United States* v. *C. I. O.*, 335 U. S. 106 (1948); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949); and *Sweatt* v. *Painter*, No. 44, Oct. Term, 1949 (now pending).

in such matters as housing,[2] employment,[3] education,[4] jury service,[5] voting,[6] etc.

For these reasons AVC respectfully moves this Court for leave to file the attached *amicus curiae* brief.

AMERICAN VETERANS COMMITTEE, INC. (AVC)

By: PHINEAS INDRITZ.

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) AMICUS CURIAE

I. THE SOUTHERN RAILWAY COMPANY'S REGULATION VIOLATES SECTION 3(1) OF THE INTERSTATE COMMERCE ACT WHICH FORBIDS DISCRIMINATION AGAINST PASSENGERS BECAUSE OF THEIR RACE.

Section 3(1) of the Interstate Commerce Act, 49 U. S. C. 1946 ed., sec. 3(1), provides:

> "It shall be unlawful for any common carrier subject to the provisions of this [act] . . . to subject

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[2] *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *City of Richmond* v. *Deans*, 281 U. S. 704 (1930).

[3] *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945); *Kotch* v. *Pilot Commissioners*, 330 U. S. 552, 556 (1947).

[4] *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1939). See *Sweatt* v. *Painter*, No. 44, Oct. Term, 1949, U. S. Sup. Ct.

[5] *Ex parte Virginia*, 100 U. S. 339 (1880); *Virginia* v. *Rives*, 100 U. S. 313 (1880).

[6] *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Schnell* v. *Davis*, 336 U. S. 933 (1949); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Rice* v. *Elmore*, 165 F. (2d) 387 (C.C.A. 4th 1947), *cert. den.*, 333 U. S. 875 (1948).

any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .'"

There is no controversy in this case on the following propositions:

(1) that the Southern Railway Company, an interstate common carrier, is subject to this provision.

(2) that this provision forbids "discrimination against colored passengers because of their race" and requires the carrier "to provide equality of treatment with respect to transportation facilities". *Mitchell* v. *United States*, 313 U. S. 80, 94 (1941); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 37, ftnt. 16 (1948).

(3) that this provision applies to the railroad's dining cars.

(4) that the seating arrangements and the partition described in the railroad's regulations are "based wholly upon color; simply that and nothing more". *Buchanan* v. *Warley*, 245 U. S. 60, 73 (1917); *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948).

We submit that the railroad's regulation and practice are tainted with unlawful racial discrimination in at least the following respects:

(1) *Inequality in promptness of service.* When the "colored" table is occupied by four colored passengers, the railroad's regulation precludes a fifth colored person from service in the dining car even though there are many vacant tables or seats in the remainder of the dining car. That

[7] Similar provisions apply to carriers by water (46 U.S.C., 1946 ed., sec. 815; 49 U.S.C., 1946 ed., sec. 905) and to carriers by air (49 U.S.C., 1946 ed., sec. 484). They are supplementary to the common-law obligation of carriers to provide equal service to all. *Missouri Pac. Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 619, 623-624 (1909).

fifth colored person is clearly subjected to a "prejudice or disadvantage" solely because of his color: he must wait, while later white passengers are seated. Similarly, when all the "white" tables are occupied, a 41st white passenger is precluded from service even though some or all of the chairs at the table reserved for "colored" passengers are empty. He too is subjected to a "prejudice or disadvantage" solely because of his color; he must wait, while later colored passengers are seated.

(2) *Mixed groups.* Where friends or families travelling together are of different racial ancestry, the railroad's regulation perpetrates a particularly obnoxious discrimination, hauntingly reminiscent of that bygone day when friends and family were separated at the slave block. For example, where such a mixed group is composed of four persons, one of whom is colored, the white persons are permitted to eat with their white friends or relatives, but the colored person is not. He is separated from his family or friends. Nor are the white persons in the group untouched by the discrimination since they are prevented from eating with their colored friend or relative.

(3) *Humiliation by use of the partition.* Aside from the embarrassment and humiliation occasioned by the denial of service to individuals in the situations mentioned above in (1) and (2), the railroad imposes humiliation and ostracism on colored passengers through the use of the half-concealing partition and the separate table as a symbolic assertion that the colored man is inferior (R. 105). In bold view of all persons in the dining car, the railroad in effect proclaims that the colored persons are unfit to sit anywhere else in the dining car. *To Secure These Rights*, Report of the President's Committee on Civil Rights, p. 79 (Oct. 29, 1947).

(4) *Denial of choice of seat.* The regulation, solely on the basis of race, denies to colored passengers any freedom of choice of a seat in the dining car. A colored passenger may eat only at the one "colored" table. All other persons on the train have at least the opportunity to choose a seat at any one of ten tables.

(5) *Inequality in location of the "colored" table.* The fact that segregation is practically always used to impose a significant discrimination is shown by the fact that the table assigned for colored passengers is the least desirable table in the dining car, *i. e.*, the table nearest the kitchen and the buffet and immediately across the aisle from the space used as the steward's office, where the bustle and disturbance to diners are greatest.

It is no answer to say that the seating space is reserved on the basis of statistical studies of the number of persons of each race seeking dining car accommodations (R. 9); or that both the white and colored races are being subjected to segregation (R. 260). These arguments, relied on by the majority decision in the court below, disregard the fact that section 3(1) of the Interstate Commerce Act expressly forbids the railroad to subject "any particular person" to unreasonable discrimination. "The essence of that right is that it is a personal one . . . It is the individual . . . who is entitled" to the protection of the statute, "not merely a group of individuals, or a body of persons according to their number." *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941); *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1939); *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). The fact that a particular colored passenger could secure dining service by coming early does not mitigate the discrimination imposed on the colored person who, finding the "colored" table filled,

is denied service while white passengers are seated at vacant seats in the dining car. *Mitchell* v. *United States, supra*, at p. 96-97. Nor does the fact that when the 40 seats at the "white" tables are filled a white person is denied service at the "colored" table although seats are there available, justify the discrimination imposed on colored persons who seek dining car service. In both instances, each such colored passenger, and each such white passenger, is subjected to unreasonable discrimination solely on the basis of his race. But this Court has pointed out that equality of treatment "is not achieved through indiscriminate imposition of inequalities". *Shelley* v. *Kraemer*, 334 U. S. 1, 21-22 (1948).

We submit that the "prejudice or disadvantage" which the railroad's regulation imposes in this case is "undue or unreasonable . . . in any respect whatsoever" and is therefore forbidden by the Interstate Commerce Act.

The national policy of the United States is against the "obviously irrelevant and invidious" distinctions of race. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203 (1944); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948); *Mitchell* v. *United States*, 313 U. S. 80 (1941); *Charter of the United Nations*, Articles 55(c), 56 (59 Stat. 1031, 1045-1046). The fact that the railroad's regulation flies in the teeth of that policy is alone sufficient to hold that it is unreasonable. *Cf. Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (D. C., E. D. Va. Alex. Div. 1949).

Nor can the discriminations which have been imposed by the railroad and sanctioned by the Interstate Commerce Commission be justified as being for the benefit of the travelling public. The regulation increases the railroad's costs and reduces service to the public. Moreover, it imposes discrimination without any regard for the wishes of

the individuals concerned. The railroad does not inquire whether a passenger seeking dining service would rather eat at a "white" table or at a "colored" table; or, where a table is partially occupied, whether the passenger already seated or the passenger seeking dining car service has any objection to the latter's being seated at the particular table. Undoubtedly there are people who would refuse to eat with persons of another race. We believe that such people do not constitute the majority of the travelling public who use the dining cars. Many southern whites "think it is all nonsense that they have the restriction" (R. 42). The railroad's assumption that the majority of travellers would affirmatively refuse is entirely *a priori*, unsupported by any investigation or inquiry from the travelling public. Furthermore, no matter what the desires or responses of the travelling public might be, the railroad's regulation flatly prohibits all passengers of different races from eating together at any vacant table. Such a regulation, we think, is unreasonable.

The railroad officials in their testimony sought to justify the regulation by saying they "had the Virginia statute in mind" when they issued their regulation (R. 202), although they disclaimed that the regulation was "based on the state laws" (R. 202, 205, 208). As a matter of fact, the Virginia statute (Va. Code (1942) sec. 3962) requires "separate cars or coaches" and does not in terms apply to dining car service. *Henderson* v. *United States*, 63 F. Supp. 906, 913 (D. C., D. Md. 1945) (R. 73). Moreover, since the Virginia statute requires a partition "with a door therein", which the wooden partition in this case lacks, the regulation would in any event not comply with the statute. The regulation, therefore, cannot be justified on the basis of the state statute.

But even if the Virginia statute is here applicable, it is clear that the application of the statute to this case would

be constitutionally invalid. The Southern Railway operates through the District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Misissippi, Louisiana, Tennessee and Kentucky (R. 167-168). These states have varying definitions as to who is a colored person. A person is labeled "colored" in these States as follows: *Kentucky:* anyone with one-fourth or more Negro blood;[8] *Mississippi, North Carolina, South Carolina:* anyone with one-eighth or more Negro blood;[9] *Florida:* anyone with one-eighth or more Negro or African blood;[10] *Alabama:* anyone with "any Negro ancestry without reference to . . . number of generations removed;"[11] *Georgia:* anyone having "any ascertainable trace of either Negro, African, West Indian or Asiatic Indian blood;"[12] *Tennessee:* anyone having "any blood of African race";[13] *Virginia:* "Every person in whom there is ascertainable any negro blood . . . except that members of Indian tribes living on reservations allotted them by the Commonwealth of Virginia having one-fourth or more of Indian blood and less than one-sixteenth of negro blood shall be deemed tribal Indians so long as they are domiciled on said reservations."[14] Thus, a person classified as "white" and seated at a "white" table while the train was in one of these states might become a "colored" person and be forced to move to the "Jim Crow" table as the train crossed the state line. These varying definitions as to who is a "colored" person were specifically

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[8] *McGoodwin* v. *Shelby*, 182 Ky. 377, 383, 206 S. W. 625, 627-628 (1918).

[9] Miss. Code Ann. (1942) sec. 459; N. Car. Gen. Stats. (1943) sec. 51-3; *State* v. *Miller*, 224 N. Car. 228, 29 S. E. (2d) 751 (1944); S. Car. Const. of 1895, Art. 3, sec. 33; *Tucker* v. *Blease*, 97 S. Car. 303, 81 S. E. 668 (1913).

[10] Fla. Stats. Ann. (1943) sec. 1.01(6).

[11] Ala. Code (1940) title 1, sec. 2.

[12] Ga. Code Ann. (1937) sec. 79-103.

[13] Tenn. Code Ann. (Michie 1938) sec. 25.

[14] Va. Code Ann. (1942) sec. 67.

mentioned by this Court as among the "interferences to interstate commerce which arise" from such "state regulation of racial association on interstate vehicles," when this Court held that the Virginia racial segregation statutes as applied to an interstate carrier were an unconstitutional burden on interstate commerce. *Morgan* v. *Virginia*, 328 U. S. 373, 382-383 (1946). See also *Matthews* v. *Southern R. System*, 157 F. (2d) 609, 81 App. D. C. 263 (1946). Since the statute upon which the railroad officials sought to justify their regulation would, if here applicable, clearly be unconstitutional, it cannot be said that the regulation is a reasonable regulation.

Equally unsubstantial is the railroad's contention that the regulation is necessary for "keeping peace and order", preventing "discord" and "race riot" and "keeping down friction" (R. 168-169). The record fails to show that there has been any difficulty in keeping the peace, or that there has been any discord or race riot, in the unsegregated use of any facility on the train. No "race riots" occur in the pullman cars, where white and colored people sit and sleep in the same car without racial segregation. Moreover, the record shows that in these very dining cars of the Southern Railway, white and colored servicemen were served together without distinction (R. 67, 151, 152) and that occasionally white and colored civilians were served together (R. 145, 147, 148, 150, 151). No disorder occurred (R. 148). Even if unrestricted use of the dining car facilities by colored passengers occasionally gives rise to an incident, the conductor has ample police authority to deal with any trouble maker (R. 180, 181). In any event "There is no room for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the act." *Mitchell* v. *United States*, *supra*, at 97.

II. THE RAILROAD'S DISCRIMINATORY REGULATION WAS APPROVED AND ENDORSED BY THE INTERSTATE COMMERCE COMMISSION. SUCH APPROVAL AND ENDORSEMENT IS EQUIVALENT TO THE ADOPTION THEREOF BY THE COMMISSION AS ITS OWN REGULATION, IMPOSING DISCRIMINATIONS SOLELY ON THE BASIS OF RACE. AS SUCH, IT IS UNCONSTITUTIONAL.

The Interstate Commerce Act provides a broad system of regulation of interstate carriers to achieve "the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . without unjust discriminations . . ." Transportation Act of Sept. 18, 1940 (54 Stat. 898, 899, 49 U. S. C., 1946 ed., note preceding sec. 1).

The Act imposes upon carriers the duty "to provide reasonable facilities . . . and to make reasonable rules and regulations . . . [sec. 1(4)]; forbids the railroad "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" [sec. 3(1)]; and requires the railroad to file with the Interstate Commerce Commission schedules setting forth "all privileges or facilities granted or allowed and any rules or regulations which in any wise . . . affect . . . the value of the service rendered to the passenger" [sec. 6(1)].

Congress has not left the enforcement of these duties to litigation in the courts. It has established the Interstate Commerce Commission [sec. 11]; has authorized "Any person . . . complaining of anything done or omitted to be done by any common carrier" to file a complaint with the Commission; and has imposed on the Commission "the duty

. . . to investigate the matters complained of" [sec. 13(1)]. The Commission is empowered to hold hearings on such complaints, and if it finds "any regulation or practice whatsoever of such carrier . . . unjust or unreasonable or prejudicial . . . the Commission is . . . empowered to determine and prescribe what . . . regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier . . . shall cease and desist from such violation . . . and shall conform to and observe the regulation or practice so prescribed" [sec. 15(1)].

In this case, Henderson filed a complaint with the Commission charging that the railroad's regulation was discriminatory and requesting that that regulation be replaced by a nondiscriminatory regulation. A hearing was held, and the Commission in its report explicitly approved and endorsed the railroad's regulation as "adequate" and "an equitable and reasonable division between the races of its available dining-car space." *Henderson* v. *Southern Railway Co.*, 258 I. C. C. 413, 419 (1944) (R. 191-192); *Henderson* v. *Southern Railway Co.*, 269 I. C. C. 73, 77 (1947) (R. 9, 10). Such approval by the Commission necessarily required a determination that the regulation was reasonable and proper. In view of the Commission's power to prescribe the regulations to govern the railroad, and its duty to prescribe nondiscriminatory regulations and to forbid discriminatory regulations, that determination and that approval of the regulation constitute an adoption of the regulation equivalent to the issuance of such a regulation by the Commission. *Cf. Smith* v. *Allwright*, 321 U. S. 649 (1944); *Schnell* v. *Davis*, 336 U. S. 933 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Kerr* v. *Enoch Pratt Free Library*, 149 F. (2d) 212 (C. C. A. 4th

1945), *cert. denied*, 326 U. S. 721 (1945). The court below, in fact, had unanimously held that since the railroad's regulations "have been directly approved by" the Commission "they are to be treated, for the purposes of this case, as in effect the Commission's rules". *Henderson* v. *United States*, 63 F. Supp. 906, 914 (D. C., D. Md., 1945) (R. 74). Accordingly, the regulation has in effect become the regulation of the Commission. As such, it must conform to the great requirements of the Constitution.

The regulation in this case is "based wholly upon color; simply that and nothing more". Its effect, as shown in Part I of this Brief, is to impose discriminations solely on the basis of race. The national policy of Congress is against racial discrimination in interstate transportation. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 37, ftnt. 16 (1948). But, even more important, the Constitution itself forbids such discrimination. This Court has consistently affirmed that under our Constitution governmental restrictions and discriminations based "wholly upon color" or aimed at particular racial groups "in the eye of the law is not justified". *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525-527 (1926); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944). And there is here entirely absent any "pressing public necessity" or "compelling justification" which it has been said "may sometimes justify" restricting the rights and freedoms of persons solely on the basis of their race. *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Oyama* v. *California*, 332 U. S. 633, 640 (1948). It is immaterial whether this Constitutional protection against the Commission's manifestation of racial hostility in endorsing and adopting the railroad's regulation is ascribed to the Due Process Clause of the Fifth Amendment, as implied in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943) and

Korematsu v. *United States*, 323 U. S. 214, 216 (1944), or is ascribed to the established public policy of the United States which forbids any branch of the Federal Government to do what the Equal Protection Clause of the Fourteenth Amendment would, if this regulation had been a State statute, clearly deny to a State Government. *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). By either of these tests, the regulation in this case cannot withstand the flame of the Constitution against racial discrimination by governmental authority.

III. THIS COURT'S PREVIOUS DECISIONS CONCERNING RACIAL SEGREGATION IN TRANSPORTATION DO NOT SUPPORT THE ENFORCED RACIAL SEGREGATION IN THIS CASE. THE "SEPARATE BUT EQUAL" DOCTRINE OF PLESSY v. FERGUSON IS INCONSISTENT WITH THE RATIONALE OF THE CONSTITUTIONAL PROTECTION AGAINST RACIAL DISCRIMINATION AND ITS APPLICATION ALWAYS RESULTS IN DISCRIMINATION. IT SHOULD BE REPUDIATED.

The Interstate Commerce Commission's order approving the railroad's regulation was based on the contention, upheld by the court below, that "racial segregation of interstate passengers is not per se forbidden by the Constitution or by any act of Congress" (R. 6); that "the principle of segregation" has been "approved by the Supreme Court" (R. 9); and that "interstate carriers may separate white and colored passengers if substantial equality of treatment is accorded to both races when traveling under like conditions" (R. 10). *Henderson* v. *Southern Ry. Co.*, 269 I. C. C. 73, 74, 77 (1947).

We submit that none of this Court's previous decisions involving racial segregation in transportation affords the

regulation in this case any shield against the thrusts either of section 3(1) of the Interstate Commerce Act or of the Constitutional protection against racial discrimination by governmental action. We believe that the principles flowing from *Railroad Company* v. *Brown*, 84 U. S. (17 Wall.) 445 (1873); *Mitchell* v. *United States*, 313 U. S. 80 (1941); *Morgan* v. *Virginia*, 328 U. S. 373 (1946); and *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948) negate the basis for the Commission's contentions. And we urge that the so-called "separate but equal" doctrine established by *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) is inconsistent with the constitutional prohibition against racial discrimination and should be repudiated.

A. This Court's decisions against racial distinctions in transportation negate the basis upon which the regulation in this case was upheld by the Interstate Commerce Commission.

In *Railroad Company* v. *Brown*, *supra*, an act of Congress authorizing a railroad to extend its line into the District of Columbia provided that "no person shall be excluded from the cars on account of color". This provision was enacted on March 3, 1863 (12 Stat. 805). The statement of the case (at p. 447) indicates that "a colored woman, on the 8th day of February, 1868, anterior to the adoption of the fourteenth and fifteenth amendments to the Constitution, bought a ticket to come from Alexandria to Washington". The railroad refused to let her ride in a car where white passengers were seated and required her to sit in a car reserved exclusively for colored people. The latter car, the carrier said, was equal in comfort to the cars reserved for white people. The railroad's evidence showed "that the regulation of separating white from colored persons was one which was

in force on the principal railroads in the country" (p. 448). This Court said (84 U. S. 445, 452-453):

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.
>
> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense . . . . It was the *discrimination in the use of the cars* on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this *discrimination* was unjust . . . . told the company, in substance, that it could extend its road within the District as desired, but that *this discrimination must cease*, and the colored and white race, in the use of the cars, be placed on an equality." [Emphasis supplied].

Railroad Company v. *Brown*, although mentioned in the majority opinion in *Plessy* v. *Ferguson*, *supra*, at 545-546, has never been expressly overruled. It demonstrates that Congress has viewed racial segregation in transportation as constituting "discrimination." We believe that the concept of "discrimination" in the Interstate Commerce Act was intended by Congress to have the same meaning with respect to racial segregation that Congress and this Court accorded to that concept in *Railroad Company* v. *Brown*. The Interstate Commerce Commission's interpretation of the Interstate Commerce Act as prohibiting racial "discrimination" but not racial "segregation" is, we think, in error and disregards the teaching of *Railroad Company* v. *Brown*. The Commission's administrative interpretation and the absence of specific Congressional repudiation

thereof are insufficient to bar this Court from re-examining that interpretation. "'It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law'', especially when it limits a human right as basic and important as the right to freedom from enforced racial distinctions. Cf. *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). In any event, there is here lacking the "very persuasive circumstances enveloping Congressional silence" which must be present before this Court may properly shift to Congress the responsibility for perpetuating the Commission's erroneous interpretation. *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940); *Girouard* v. *United States*, *supra*, 69-70.

Mitchell v. *United States*, 313 U. S. 80 (1941) was initiated, as was this case, by a complaint filed with the Interstate Commerce Commission, under the Interstate Commerce Act, against a railroad's refusal of available pullman accommodations to a Negro passenger after the drawing room, reserved for Negroes, had become occupied. This Court, explicitly putting aside the question of segregation (p. 94), held that the railroad's practice was discriminatory and that "comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment" (p. 97). The present case involves, among other matters, the railroad's refusal of available seats in the dining car after the table reserved for colored people has become occupied.

In *Morgan* v. *Virginia*, 328 U. S. 373 (1946), this Court held that a Virginia statute requiring a common carrier in interstate commerce to allocate separate seats to white and colored persons was invalid as an undue burden on interstate commerce.

In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948), a Michigan statute penalizing the denial of "full and equal accommodations, advantages, facilities and privileges of

. . . public conveyances on land and water'' was applied to a company which refused to grant equal accommodations to a colored person on a vessel plying between Detroit, Michigan and Bois Blanc Island in Ontario, Canada. This Court held that the statute as thus applied was not an unconstitutional burden on foreign commerce.

These cases, we submit, establish a pattern of hostility to racial discrimination and segregation in transportation stemming from both Congress and the Constitution. They indicate that compliance with the Constitution and the Interstate Commerce Act in transportation, at least where the transportation is subject to Federal power, as it is here, can be achieved only through the pattern of unsegregated transportation. They undermine and negate the basis upon which the regulation in this case was upheld by the Interstate Commerce Commission.

B. This Court's decisions refusing to invalidate racial segregation in transportation do not aid the regulation in this case.

None of the decisions by this Court refusing to invalidate racial segregation in transportation aid the regulation here involved. None of them, in fact, involved a complaint filed with the Interstate Commerce Commission under Section 3(1) and 1(4) of the Interstate Commerce Act, as is the case here. Nor was the Interstate Commerce Act even mentioned in those cases.

In three of those cases, involving suits initated in State courts, this Court held that railroad companies prosecuted for failure to comply with State segregation statutes applicable only to intrastate commerce could not successfully defend on the theory that the statutes unconstitutionally burdened interstate commerce. Clearly, these decisions are not relevant to this case. In fact, the first of these three decisions explicitly stated (at p. 589): ''It will also be

observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment . . . and hence there is no question of personal insult or alleged violation of personal rights." *Louisville, New Orleans and Texas Ry. Co.* v. *Mississippi*, 133 U. S. 587 (1889); *Chesapeake & O. R. Co.* v. *Kentucky*, 179 U. S. 388 (1900); *South Covington & Cin. R. Co.* v. *Kentucky*, 252 U. S. 399 (1920). The narrow reach of these three cases is amply demonstrated by this Court's decision in *Morgan* v. *Virginia*, 328 U. S. 373 (1946), invalidating Virginia's transportation segregation law in its application to interstate commerce.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151 (1914), a suit was initated in a state court to enjoin the enforcement of Oklahoma's "Separate Coach Law" as repugnant to the Commerce Clause and the Fourteenth Amendment of the Constitution. The attack failed primarily because the complainant's allegations were "too vague and indefinte", and the complainants were not proper parties, to warrant injunctive relief. In addition, the Commerce Clause argument was rejected because the statute applied only to intra-state commerce; and the Fourteenth Amendment argument against segregation was rejected (at p. 160) simply on a citation to *Plessy* v. *Ferguson*, *supra*. Thus, the *McCabe* case, insofar as its refusal to invalidate the segregation there present is pertinent here, rests at most only on the citation to the *Plessy* case.

In *Chiles* v. *Chesapeake, etc., R. Co.*, 218 U. S. 71 (19 , an interstate passenger who was forced to ride in a s a rate "colored" car instituted an unsuccessful suit for damages in a state court against the carrier. The carrier's regulation was not based on a state statute. The decision rested almost entirely on *Hall* v. *DeCuir*, 95 U. S. 485 (1877) for the proposition that "the inaction of Congress was equivalent to the declaration that a carrier could by regula-

tions separate colored and white interstate passengers" and on *Plessy* v. *Ferguson, supra,* as permitting "separate but equal" transportation accommodations. However, *Hall* v. *DeCuir* did not involve the constitutional right of passengers to be free from racial segregation under state law. All that this Court there held was that a State lacked power to award damages against a carrier engaged in interstate commerce for failing to comply with a state law forbidding the denial of equal accommodations on the basis of race, because the enforcement of such a statute unduly burdens interstate commerce. Moreover, *Hall* v. *DeCuir* was decided 10 years before the enactment of the Interstate Commerce Act of 1887.[15] The latter act, certainly, is "Action of Congress". *Hall* v. *DeCuir* therefore furnishes no support for the *Chiles* decision. Nor did the *Chiles* opinion even mention the Interstate Commerce Act. The *Chiles* decision therefore cannot be deemed to be a construction of the Interstate Commerce Act.

Thus, the edifice of racial segregation in transportation, which these cases appear to support, rests essentially (a) on cases where it was sought to apply the Commerce Clause to intra-state commerce, cases brought by improper parties, and cases decided prior to the enactment of the Interstate Commerce Act, none of which are here relevant; and (b) on the "separate but equal" doctrine of *Plessy* v. *Ferguson.* We therefore turn to analyze the *Plessy* decision.

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[15] The Civil Rights Act of March 1, 1875 (18 Stat. 335), enacted 2 years before the *Hall* decision, forbade public carriers from refusing equal accommodations because of race. No mention of this act was made in the *Hall* case. However, this act was later held invalid in *Civil Rights Cases,* 109 U. S. 3 (1883), which involved intra-state accommodations. The act was subsequently held to be inseparable, and in view of its invalidation in *Civil Rights Cases,* not applicable to a common carrier by water in the coastwise trade, a field clearly subject to the Commerce Power of Congress. *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126 (1913).

C. PLESSY v. FERGUSON is unsound and should be repudiated.

Plessy v. *Ferguson* held that a state statute requiring an intra-state railroad to furnish equal but separate accommodations for white and colored people by providing two or more passenger cars for each passenger train or by dividing the passenger coaches by a partition and punishing any passenger entering a coach or compartment not allocated to his race, was not invalid under the Thirteenth and Fourteenth Amendments.

Plessy was initiated in a State Court and involved a State segregation statute applicable only to intra-state transportation. It did not involve, as does this case, a complaint filed with the Interstate Commerce Commission under the Federal Interstate Commerce Act.

Moreover, *Plessy* did not expound a general rule that "separate but equal" is equal protection in every area of human relations. Actually, *Plessy* correctly stated that it would be unconstitutional for a State to make unreasonable distinctions between white and colored people, such as "to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color." (163 U. S. 537, 549-550). The application of this very standard, particularly in view of the undue burden which a state segregation statute would impose on interstate commerce (*Morgan* v. *Virginia*, *supra*), and the national policy against racial distinctions, would render

unreasonable the notion of "separate but equal" in relation to this case.

In any event, if *Plessy's* holding, that segregation on intra-state trains is compatible with the Fourteenth Amendment, is deemed applicable to this case, we believe that *Plessy* is erroneous and should now be overruled. *Plessy* has for too long clothed racial discrimination and segregation with the cloak of Supreme Court approval. Justice Harlan was indeed prophetic in his dissent in *Plessy* (at p. 559): ". . . the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.*" [*Dred Scott* v. *Sanford*, 60 U. S. (19 How.) 393 (1856).]

We urge that *Plessy* is erroneous in at least the following points:

(1) *Plessy* postulates a distinction in the Fourteenth Amendment between "social" and "political equality." At p. 544, the court said: "The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." However, the Fourteenth Amendment contains no such distinction. What the Fourteenth Amendment did, as this Court stated in *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880), was to provide "a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It is

not the labeling of a right as "political" or "social," but rather whether governmental authority has been used to deny to anyone, on the basis of race, a right or privilege available to others, which determines the application of the Fifth and Fourteenth Amendments in racial cases. Train travel, certainly, is no more exempt from the application of the Fifth and Fourteenth Amendments as being "social" in nature than is the right to acquire a home in a neighborhood which the Fourteenth Amendment protected in *Buchanan* v. *Warley*, 245 U. S. 60 (1917) and *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Nor did this Court make any such distinction when it protected the right of a colored man to pullman accommodations on a train in *Mitchell* v. *United States*, 313 U. S. 80 (1941). In any event, the *Plessy* statement was not even pertinent—the colored man in *Plessy* was demanding, not the abolition of discrimination in private social relations, but only that the State should not by law compel the imposition of racial prejudice in the use of business facilities open to the public. The Fourteenth Amendment does not reach private action, but it certainly reaches State action. *Civil Rights Cases*, 109 U. S. 3 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

(2) A second major erroneous assumption underlying the *Plessy* decision was the majority's statement that "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . ." (p. 544), and its denial that "the enforced separation of the two races stamps the colored race with a badge of inferiority" (p. 551). The fact is, however, that equal treatment is never seriously intended or achieved under a system of racial segregation. The very purpose of compulsory racial segregation is to impose a symbolic superior-inferior caste system based on race

which is totally independent of rational proofs or disproofs of any individual's capacities or abilities. The imposition of such caste status is itself discriminatory. Southern courts candidly recognize this when they award damages for "humiliation" to a white person who has been compelled to ride in the Negro section of a train,[16] or when they award damages to a white person who has been called "Colored."[17]

(3) Another major erroneous assumption in *Plessy* was that the distinction between white and colored people, on trains, rested on valid factual differences and was "a reasonable regulation" with respect to which the State "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order" (p. 550). The unsoundness of that assumption has been conclusively demonstrated by the anthropological, educational, sociological and international developments from 1896 to 1949. Furthermore, it is obvious that the very purpose of the Fourteenth Amendment was to prevent the use of State authority to impose racial distinctions based on "established usages, customs and traditions." Moreover, this Court has clearly established, in the housing segregation cases, that State-imposed racial segregation cannot be "justified as proper exertions of state police power" for the "preservation of the public peace." *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948); *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917). In addition, this Court has in recent years eloquently expressed

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[16] *Louisville & N. R. Co.* v. *Ritchel*, 138 Ky. 701, 147 S. W. 411 (1912); *Missouri, K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

[17] *Flood* v. *News & Courier Co.*, 71 S. Car. 112, 50 S. E. 637 (1905); *Wolfe* v. *Georgia Ry. & Electric Co.*, 2 Ga. App. 499, 58 S. E. 899 (1907); *Collins* v. *Okla. State Hospital*, 76 Okla. 229, 184 Pac. 946, 947 (1919).

the Constitutional infirmity of racial distinctions by government authority and has firmly established the principle that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943); see *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886).

(4) *Plessy* sought to justify its assumptions by pointing to the existence of "separate schools for white and colored children, which has been held to be a valid exercise of the legislative power . . ." (p. 544). However, most of the court's reliance was on cases such as *Roberts* v. *Cushman*, 59 Mass. (5 Cush.) 198 (1849), decided *before* the Civil War and *before* the adoption of the Fourteenth Amendment. Moreover, this Court has never directly passed upon the constitutional validity of statutes requiring separate schools for white and colored children and this issue is now before this Court in *Sweatt* v. *Painter*, No. 44, October Term, 1949.

(5) Another justification suggested by *Plessy* was that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the State" (p. 545). In fact, however, this Court has never passed upon this question. *Plessy* implicitly recognized this by failing to cite *Pace* v. *Alabama*, 106 U. S. 583 (1883), the only decision of this Court which superficially might have justified the quoted statement, but actually does not do so. *Pace* v. *Alabama* involved an indictment for the crime "of adultery or fornication" (p. 584) between persons of different races under a statute

which imposed a greater punishment for such adultery than was imposed for adultery between persons of the same race. The argument that the statute violated the Fourteenth Amendment was rejected on the ground that the statute "applies the same punishment to both offenders, the white and the black" (p. 585). However, the rationale of the *Pace* case has been undermined by this Court's decision that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities". *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). In any event *Pace* v. *Alabama* involved a crime, not a question of intermarriage or of governmental interference on the basis of race with the fundamental human right to marry. See also *Perez* v. *Lippold*, 32 Calif. (2d) 711, 198 P. (2d) 17 (1948) (invalidating California anti-miscegenation law).

(6) At p. 545, the *Plessy* majority said: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court." However, neither in the three cases cited by *Plessy* for this proposition, nor in any other case except *Plessy* itself, has this Court ever expressed any such distinction. *Hall* v. *DeCuir*, *supra*, invalidated a state statute prohibiting racial segregation as applied to an interstate vessel only because it was deemed an undue burden on interstate commerce. The *Civil Rights Cases*, *supra*, invalidated the Federal Civil Rights Act of March 1, 1875, which governed private conduct, solely because the Fourteenth Amendment was deemed to preclude only discriminatory State action. And *Louisville, New Orleans, etc., Ry.* v. *Mississippi*, *supra*, merely held that a state segregation statute applicable only to intra-state transportation could not be invalidated solely on the theory that it unduly burdened interstate commerce. This Court

certainly gave no comfort to this distinction when it ruled against racial discrimination and segregation in transportation in the four cases mentioned above in Part III-A of this Brief or when it upheld the New York statute prohibiting exclusion from a labor union on account of race in *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945).

(7) Typical of the erroneous and superficial nature of *Plessy* was its statement (p. 548) that "statutes for the separation of the two races upon public conveyances were held to be constitutional in" 12 named state and federal cases. Not one of these cases supports that statement. See analysis of the cases in Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219, 248-251 (March, 1946).

(8) At p. 551, the majority in *Plessy* stated: "The [plaintiff's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." But this statement errs in positing that compulsory racial segregation is the only alternative to "enforced commingling of the two races." There is a third alternative—voluntary contact between individuals who are not subjected to any statute either restricting or compelling contacts between members of different races. The invalidation of the compulsory segregation statute in *Plessy* would have left only voluntary contact, not "enforced commingling," since there was no law which "enforced commingling." And any person who did not want to use a facility open to the public, such as the trains in *Plessy*, because people of another race were using it would not have

been compelled by law to use it. He would then have been completely free to use it or not to use it. But if he did use it he would not have the right to exclude others, solely because of their race, from using it. See *Ferguson* v. *Gies*, 82 Mich. 358, 367-368, 46 N. W. 718, 721 (1890). At most, the *Plessy* statement noted above justifies only the *elimination* of compulsory racial laws, whether requiring or prohibiting segregation, in order that the white and colored people may arrange their contacts on a voluntary basis. It cannot justify legislation, such as the compulsory segregation law in *Plessy*, or the compulsory regulation in this case, which *creates* social prejudices, *prevents* voluntary contact between individuals of different races, and requires everyone to conform to the bias of a few.

(9) Equally spurious was the statement of the majority in *Plessy* (at p. 551) that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences. . . ." That statement simply is not true. Legislation substantially molds social mores. But even if the *Plessy* statement is partially true, it was wholly inapplicable since the legislation in the *Plessy* case *prescribed* legislative distinctions based on race, instead of *forbidding* them as did the statutes in *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948) and *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945).

D. Compulsory segregation, on the basis of race, is discrimination.

Compulsory racial segregation means discrimination. This fact is commonly known. Every survey of racial segregation has proved it. Those who say that enforced separation can theoretically be accompanied by equality, shut their eyes to the facts of life and ignore the real and fundamental inequality resulting from a caste distinction which is enforced by law.

The President's Committee on Civil Rights stated in its report, *To Secure These Rights*, pp. 81-82 (Oct. 29, 1947):

> "Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates educational, recreational and other public services, according facilities to the two races which are 'separate but equal.' In the Committee's opinion this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax supported services and facilities. . . . No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."

Gunnar Myrdal, in his brilliant and comprehensive study of the American Negro, *An American Dilemma, The Negro Problem and Modern Democracy*, Vol. I, p. 581 (1944) stated:

> "It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination. Again the Southern white man is in the moral dilemma of having to frame his laws in terms of equality and to defend them before the Supreme Court—and before his own better conscience, which is tied to the American Creed—while knowing all the time that in reality his laws do not give equality to Negroes, and that he does not want them to do so."

See also the Report of the President's Commission on Higher Education, Vol. II, p. 31 (Dec. 11, 1947), and the

Report of the National Committee on Segregation in the Nation's Capital, *Segregation in Washington* (Dec. 10, 1948).

These surveys have amply confirmed what state courts have repeatedly held in cases arising under state statutes requiring "equal accommodations," *i. e.*, that a racially segregated accommodation is not an "equal accommodation"—it is "discrimination." *Ferguson* v. *Gies*, 82 Mich. 358, 46 N. W. 718 (1890) (separate table in dining room); *Crosswaith* v. *Bergin*, 95 Colo. 241, 35 P. (2d) 848 (1934) (segregation in restaurant).[18]

The time has come to overrule *Plessy* v. *Ferguson* and to call a halt to the cancerous evil of racial discrimination which has spawned and flourished under the "thin disguise" of the "separate but equal" doctrine.

Respectfully submitted,

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OCTOBER 12, 1949
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[18] Similar decisions as to theatres are: *Randall* v. *Cowlitz Amusements, Inc.*, 194 Wash. 82, 76 P. (2d) 1017 (1938); *Anderson* v. *Pantages Theater Co.*, 114 Wash. 24, 194 Pac. 813 (1921); *Jones* v. *Kehrlein*, 49 Calif. App. 646, 194 Pac. 55 (1920); *Joyner* v. *Moore-Wiggins Co., Ltd.*, 152 App. Div. 266, 136 N. Y. Supp. 578 (1912); *Baylies* v. *Curry*, 128 Ill. 287, 21 N. E. 595 (1889); *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667 (1926). Similar decisions as to schools are: *People* v. *Board of Education of Detroit*, 18 Mich. 400 (1869); *Tape* v. *Hurley*, 66 Calif. 473, 6 Pac. 129 (1885); *Clark* v. *The Board of Directors*, 24 Iowa 266 (1868); *Wysinger* v. *Crookshank*, 82 Calif. 588, 23 Pac. 54 (1890).

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IN THE

Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON,
Appellant

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
SOUTHERN RAILWAY COMPANY,
Appellees

On Appeal from the United States District Court for the District of Maryland

MOTION FOR LEAVE TO FILE BRIEF
and
BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS *AMICUS CURIAE*

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IN THE

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ELMER W. HENDERSON,

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vs.

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Appellees

No. 25, October Term 1949

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Congress of Industrial Organizations respectfully moves this Court for leave to file the annexed brief *amicus curiae*. The appellant, and two af the appellees, the United States and the Interstate Commerce Commission, have consented to the filing of this brief; the remaining appellee, the Southern Railway Company, has refused its consent.

The preamble to the Constitution of the Congress of Industrial Organizations provides:

> "Democracy stems entirely from free choice. Diligently practiced, it is the only logical human formula for the attainment of economic and political independence; for the realization of a just and equitable return on one's labor; for guarantees of full employment, of social security, and of the protection of the family as an institution. . . .
>
> "The struggle for human freedom is a continuous one. The task of those who would bring security and greater understanding to mankind throughout the world is endless. It is in this all-consuming struggle, however, that men and organizations make their contributions to a better life. Therefore, we in the CIO glory in our heritage and in the hope of our future. Racial prosecution, intolerance, selfishness, and greed have no place in the human family. We will not be satisfied until ours is a world of free men and women and of happy children. It is to these ends that this Constitution of the CIO is dedicated.

> It is the charter of our lives; through it we seek to maintain and extend liberty and opportunity here and throughout the world."

As an organization so dedicated, the CIO has a real and genuine interest in the elimination of discrimination based on color from every phase of American life. It has, therefore, an interest in the present litigation, in which the validity of governmentally sponsored racial discrimination is called into question.

In addition to this general interest in the elimination of discrimination, the CIO has a particular practical interest in the outcome of this litigation. Governmental action requiring racial segregation is not only offensive to the principles for which this organization stands. It also has a direct effect on this organization's activities. The CIO, through its constituent organizations, is endeavoring to practice non-segregation and non-discrimination in the every day functioning of labor union affairs. Repeatedly, in the past, this endeavor has been obstructed by statutes, ordinances, and regulations which require segregation in public dining places, public meeting halls, toilet facilities, etc. Thus, in some states CIO unions are required to maintain "separate but equal" facilities in their own semi-public buildings, despite the avowed desire of the membership to avoid segregation in any form.

These requirements, whether in the form of regulations, statutes or ordinances, rest constitutionally on a line of reasoning and authority identical with that relied on by the court below in the present case. The disposition which this court makes of the case is, therefore, of real and direct interest to the Congress of Industrial Organizations in the regulation of its activities.

Accordingly, the Congress of Industrial Organizations moves this Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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IN THE

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BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS *AMICUS CURIAE*

1. That the dining car regulations of the Southern Railway, sanctioned and approved by the Interstate Commerce Commission, are discriminatory has, we think, been amply demonstrated by the appellant, by the United States and by other *amici curiae*. We will not, therefore, labor that point in this brief. We should like, however, to emphasize one aspect of the matter which is of particular importance to the Congress of Industrial Organizations.

A regulation setting aside separate places for Negro diners, like a regulation requiring separate eating places, toilet facilities, etc., does more than discriminate against Negroes. It also has the effect of enforcing segregation practices on those, Negro and white alike, to whom such practices are abhorrent.

This has been the experience of the Congress of Industrial Organizations. In Memphis, for example, the CIO owns and operates a public meeting place for the use of its members. The CIO is opposed to segregation. But the CIO violates a Memphis ordinance if, in accordance with the overwhelming

preference of its membership, it fails to provide segregated facilities in its own building.

Similarly, in the present case, Negro and white are forbidden to dine together on the cars of the Southern Railway. The present regulation does not merely have the effect of permitting those Negroes or whites who prefer not to sit with members of the other race to exercise that preference. There is no question of preference or choice. To the contrary, the wishes of the particular diners are ignored. They must practice segregation whether they wish to or not.

It is not merely a matter of a governmental body offering separate facilities to members of different races, as in the education cases. As we have elsewhere stated,[1] we believe that such practices are unconstitutional. But the present regulation does more. It requires individuals who travel on the same train to themselves practice discrimination and segregation when they enter the railroad's dining car. The present regulation does not merely permit individuals to avoid sitting with members of different races. On the contrary, it forbids them to sit together, irrespective of their own personal preferences.

The evil in the dining car regulations is thus not only that a Negro may be refused a seat at a time when seats are available to whites, and, similarly, that a white may be refused a seat when seats are available to Negroes. The evil is also that the regulations decree that those who patronize the diner must divide themselves, on a line based on color, before they may be seated, whether they wish to do so or not. That evil would exist even if the railroad provided unlimited diner facilities so that no person would ever be denied a seat because of his color. Even were such facilities available, both Negro and white would be subjected "to undue and unreasonable prejudice and disadvantage" by being forbidden to sit, when they so desired, with members of the other race.

2. This aspect of the dining car regulations here involved is of the greatest importance. This case cannot properly be

[1] See Brief for Congress of Industrial Organizations as amicus curiae in *Sweatt* v. *Painter*, No. 44, October Term, 1949.

decided on the sole ground that the regulations, as they now stand, may deny seats to individual patrons because of their color. It cannot properly be so decided because this Court has an obligation to the parties, and in particular to the Interstate Commerce Commission, to give some indication as to the proper basis on which an acceptable regulation may be drawn.

It will be remembered that the Southern Railway's initial dining car regulation provided for segregated tables but permitted the use of the Negro tables by whites when the white section of the car was full. The Negro tables were thus only "conditionally reserved," while the white tables were absolutely reserved.

The District Court found this regulation to be invalid. The Commission then approved a new regulation which met the narrow objection of the District Court by making the reservation of the Negro table for Negroes absolute rather than conditional. This revised regulation is now under attack. It too can be held invalid on a narrow ground because, under it, a Negro may be denied a seat when the Negro table is occupied but a white table is empty and, similarly, a white may be denied a seat when the white tables are occupied but the Negro table is vacant. This was the narrow ground on which Judge Soper dissented below.

The difficulty with such a holding is that again the Commission, on remand, may change the regulations to meet this objection, without disturbing the basic evil involved in enforced segregation. Reverting to its earlier practice of conditional reservations, the railroad will be able to provide that both Negro and white tables be conditionally reserved, so that the overflow from one section can be taken care of in the other whenever tables are available in the other.

Such a regulation would, we submit, also be invalid if it maintained the present prohibition against the joint seating of Negroes and whites when the individuals concerned desired it. The Court has no obligation, of course, to pass upon the validity of a hypothetical regulation. But it does have an obligation to pass upon the present regulation in a straight-

forward manner so that the Commission, and the Courts below, can know whether the Federal government, through the Interstate Commission, may force upon the patrons of dining cars an involuntary separation based on race. That issue is directly presented in the present case and, we submit, it should be decided so as to avoid further fruitless litigation.

3. The segregation issue arises in this case under the provisions of the Interstate Commerce Act providing that it shall be unlawful "to subject any particular person . . . to any unreasonable prejudice or disadvantage in any respect whatsoever." The briefs of the appellant and of the United States demonstrate, without question, we believe, that the dining car regulations transgress this statutory command. In our view, however, decision cannot be made on this point without reference to the provisions of the 14th Amendment.

The command of the Interstate Commerce Act that no railroad shall "subject any particular person . . . to any undue or unreasonable prejudice or disadvantage" is a broad one, "Not only was the evil of discrimination the principal thing aimed at, but there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." *Mitchell* v. *United States*, 313 U. S. 80, 94.

But the command of the statute is no broader than the command of the 14th Amendment that no state shall deny to any person the equal protection of its laws. Indeed in the *Mitchell* case, this court, in dealing with the discriminatory practices of a carrier, approached the statutory problem only *via* the 14th Amendment. Faced with the issue as to whether a railroad regulation discriminating against Negroes was in violation of the statute, the Court first decided (313 U. S. at 94) that the regulation, if enforced by a state, would be a violation of the 14th Amendment, citing *McCabe* v. *Atchison, T. & S. F. Railway Co.*, 235 U. S. 151 and *Missouri* ex rel. *Gaines* v. *Canada*, 305 U. S. 337. This was the Court's first premise. The second premise was that the requirements of the statute were as broad as those of the 14th Amendment. The Court

concluded, therefore, that the regulation was in contravention of the statute.

In the present case, similarly, the statutory standard cannot be dealt with apart from the precedents which this Court has established in dealing with state regulation under the 14th Amendment. The commandments of the statute and the Amendment are the same. The Amendment is addressed to the states and commands them not to deny to any person the equal protection of the laws. The statute is addressed to the railroads (and the Commission) and directs them not to deny to any particular person the equal protection of their regulations. The substance of both commands is the same.

It is for this reason that we believe that this case cannot be decided without reference to *Plessy* v. *Ferguson*, 163 U. S. 537, and should not be decided without expressly reversing the rule of that case. The Court, in *Plessy* v. *Ferguson*, held that a state statute requiring racial separation in public carriers was not in violation of the 14th Amendment. In this case, the Court has before it a regulation of the Interstate Commerce Commission requiring racial separation in dining cars. The question before the Court is whether this regulation violates a Federal statutory command identical in content with the 14th Amendment. That question, we submit, cannot be decided without reference to the *Plessy* case.

4. The background and the subsequent history of the *Plessy* case have been thoroughly explored in the briefs already presented to the court. We should like to emphasize here, as we have done above, the compulsory nature of the segregation involved in both the *Plessy* case and the present case. In the *Plessy* case, the Court ignored the very important distinction between a provision of law *permitting* individuals to separate themselves according to race and a provision *requiring* them so to separate. Obviously the two are different. The first permits individuals to exercise their own freedom of choice, to respond in whatever way their prejudices or lack of prejudices may impel them. The second, on the contrary, permits no choice. Prejudice is imposed by the constituted authority without regard to the preferences of individuals.

Yet the Court, in the *Plessy* case, treated the two together and seemed to have assumed that they were the same. In so doing, we submit, it announced a doctrine which is erroneous and which should no longer be permitted to stand. Thus the Court said that "we cannot say that a law which authorizes or even requires the separation of the two races in public conveyance" is violative of the 14th Amendment. 163 U. S. at 550. And the argument against the statute, the Court said, "assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races." 163 U. S. at 551. The argument, of course, need make no such assumption. The alternatives are not enforced segregation or enforced commingling.[1] Nor is the question whether a law may constitutionally *permit* the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a state, or the Interstate Commerce Commission, may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

The Court could confuse the issue, as it did in the *Plessy* case, only because it implicitly assumed throughout the opinion that the Negro race was "inferior"[2] and that, given freedom of choice, all whites would refuse to associate with Negroes. On that assumption, and only on that assumption, the only alternatives were segregation and compulsory intermingling, and permissive separation was the same thing as compulsory separation.

The assumption is false. The Congress of Industrial Organizations is living proof that it is false. And, apart from matters of proof, certainly such an assumption, embodying itself the very prejudices at which the 14th Amendment was aimed, has no place in our constitutional doctrine.

The time has come, we believe, for the Court to disavow

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[1] These alternatives could possibly be argued to be exclusive only in cases involving compulsory public education, where there is usually no choice as to attendance and seating arrangements.

[2] "If one race be inferior to the other socially," the Court said, "the Constitution of the United States cannot put them upon the same plane." 163 U. S. at 551.

that assumption and the constitutional doctrine which rests upon it. The dining car regulations now before the Court squarely present the basic question: whether a command, either statutory or constitutional, outlawing all discrimination based on race, is violated by a statute or a rule which positively imposes upon the community the practice of racial segregation. The erroneous answer to that question given in *Plessy* v. *Ferguson* should here be reversed and the odious doctrine of that case explicitly expunged.

Respectfully submitted,

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILWAY COMPANY.

On Appeal from the United States District Court for the District of Maryland

MOTION AND BRIEF OF AMERICAN JEWISH CONGRESS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON,

Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILWAY COMPANY.

On Appeal from the United States District Court for the District of Maryland

---

MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the American Jewish Congress and on its behalf, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The American Jewish Congress is an organization committed to the principle that the destinies of all Americans are indissolubly linked and that any act which un-

justly injures one group necessarily injures all. Out of this firmly held belief, the American Jewish Congress created its Commission On Law and Social Action in 1945 in part "To fight every manifestation of racism and to promote the civil and political equality of all minorities in America."

Believing as we do that Jewish interests are inseparable from the interests of justice, the American Jewish Congress cannot remain impassive or disinterested when persecution, discrimination or humiliation is inflicted upon any human being because of his race, religion, color, national origin or ancestry. Through the thousands of years of our tragic history we have learned one lesson well: the persecution at any time of any minority portends the shape and intensity of persecution of all minorities. There is, moreover, an additional reason for our interest. The special concern of the Jewish people in human rights derives from an immemorial tradition which proclaims the common origin and end of all mankind and affirms, under the highest sanction of faith and human aspirations, the common and inalienable rights of all men. The struggle for human dignity and liberty is thus of the very substance of the Jewish tradition.

We submit this brief *amicus* because we are convinced that the policy of segregation has had a blighting effect upon Americans and consequently upon American democratic institutions. We believe that the doctrine of "separate but equal" has engendered hatred, fear and ignorance. We recognize in this triumvirate our greatest enemy in the struggle for human freedom. But our concern must not be construed as limited to minorities alone. The treatment of minorities in a community is indicative of its political and moral standards and ultimately determinative of the happiness of all its members. Our immediate objective here is to secure unconditional equal-

ity for Americans of Negro ancestry. Our ultimate objective in this case, as in all others, is to preserve intact the dignity of all men.

We have sought the consent of counsel for the four parties to the filing of this brief. Counsel for appellant, the United States and the Interstate Commerce Commission have consented. Counsel for the Southern Railway Company has refused consent.

Dated, New York, New York, October 17, 1949.

WILL MASLOW,
Attorney for American Jewish Congress.

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---

BRIEF OF AMERICAN JEWISH CONGRESS AS AMICUS CURIAE

The American Jewish Congress respectfully submits this brief, as *amicus curiae*, in support of appellant. Our interest in the issues raised by this case is set forth in the motion for leave to file annexed hereto.

Statement of the Case

This proceeding originally arose out of the refusal of the Southern Railway, on May 17, 1942, to serve appellant, a Negro, in one of its dining cars. The various steps in the subsequent proceedings are fully set forth in the

appellant's brief. Because the railroad subsequently changed its rules, the issue presently before this Court is sufficiently revealed by the following facts:

The railroad's most recent rules, effective March 1, 1946, provide that, after certain structural changes are made in its diners, one of the thirteen tables in each diner will be reserved absolutely for Negroes, and will be separated from the rest of the car by a five-foot partition. No white passengers will be served at this one table and no Negro passengers will be served at the other twelve tables.

On September 5, 1947, the Interstate Commerce Commission held that this rule satisfied Section 3(1) of the Interstate Commerce Act. *Henderson* v. *Southern Railway*, 269 I. C. C. 73. That decision was upheld by a three-judge District Court (*Henderson* v. *Southern Railway*, 80 F. Supp. 32, D. C. Md., 1948), Judge Soper dissenting, and the present appeal is from the decision of that Court.

The Question to Which this Brief Is Addressed

This brief is addressed solely to the question whether the requirements of equality contained in either the Fifth and Fourteenth Amendments to the United States Constitution or Section 3(1) of the Interstate Commerce Act, 49 U. S. C. 3(1), are satisfied by affording "separate but equal" facilities to Negro and white passengers on interstate railroads.

Summary of Argument

I. In holding that a requirement of equal treatment can be satisfied by providing segregated facilities, the decision in *Plessy* v. *Ferguson* was wrong historically, legally and factually.

A. The Court erred historically in finding that the Fourteenth Amendment was not "intended to abolish distinctions based on color."

B. The Court erred as a matter of law in holding that segregation laws could be sustained either as an exercise of the police power or on the theory that physically equal facilities were necessarily equal in the Constitutional sense.

C. Assuming that segregated facilities can be equal, the Court erred as a matter of fact in concluding that officially imposed segregation does not place a badge of inferiority on the Negro race.

(1) Segregated facilities necessarily have an inferior value if they are assigned to a group in the community which the dominant group regards as inferior. In determining the value of a particular piece of property, the law examines not only its physical characteristics but also any other intangible factors which are given weight by the community at large. When the facilities are used exclusively by a group which the community regards as inferior, they become inferior in value.

(2) Even if the facilities are in all respects equal in value, segregation is discriminatory because of the adverse effect which it has on the Negro community. Recent studies reveal unanimity of opinion among students of race relations

that segregation causes psychological damage to the individual members of the Negro community which they would be spared if segregation were not imposed.

II. A requirement of equality can never be satisfied by segregated facilities because the official act of segregation of itself gives superior value to the facilities assigned to the dominant group.

A. An official policy of segregation would unquestionably be unconstitutional if the official body which imposed it simultaneously proclaimed that maintenance of racial superiority was its purpose.

B. The placing of a racial or religious group in inferior status by segregation can be accomplished without such an express declaration of status. Otherwise it would be easy to evade the constitutional restraint. The implicit declaration of inferiority can be made either in other official acts or by incorporating in the segregation policy a previously existing social stratification.

C. The segregation of Negroes does in fact maintain an officially declared status of inferiority as well as a previously established status of social inequality.

(1) Official declarations of inferiority are found in various statutes and in judicial decisions holding, for example, that it is libelous *per se* to call a white man a Negro and that a white man required to ride in a Negro coach may recover damages.

(2) The previously established social inequality is shown by the unanimous findings of students of race relations.

III. The separate but equal doctrine has never been, and should not now be, applied to Section 3(1) of the Interstate Commerce Act by this Court. This case can be decided in favor of appellant without overruling the holding in *Plessy* v. *Ferguson* that segregated facilities may be provided without violating the Fourteenth Amendment.

ARGUMENT

POINT I

The doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, that separate but equal facilities satisfy requirements of equal treatment, should be overruled.

Subseetion 1 of Section 3 of the Interstate Commerce Act provides that:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Since the question was first raised, the Interstate Commerce Commission has consistently held that this provision forbids discrimination against Negro passengers because of their race. *Councill* v. *Western & Atlantic R. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. R. Co.*, 1 I. C. C. 428; *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I. C. C. 399; *Stamps & Powell* v. *Louisville & Nashville R. R. Co.*,

269 I. C. C. 789. See also *Mitchell* v. *United States*, 313 U. S. 80, 95. In *Edwards* v. *Nashville, C. & St. L. Ry. Co.*, 12 I. C. C. 247, 249, the principle was thus stated:

> "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations shall be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passenger to 'undue and unreasonable prejudice and disadvantage.'"

Section 3(1) of the I. C. C. Act, however, is not the only prohibition of discrimination which has been invoked here. The United States Government, in its brief as a party to this case, suggests that the Fifth Amendment to the United States Constitution also applies because the alleged discrimination was approved by an agency of the Federal Government, the I. C. C. (U. S. Brief, pp. 14-15). We agree. Indeed, the Court below itself recognized that the railroad's regulations were "directly approved by" the I. C. C., and hence "are to be treated, for the purposes of this case, as in effect the Commission's rules." 63 F. Supp., at page 914.

We suggest further, however, that the equal protection clause of the Fourteenth Amendment also applies. Railroads enjoy a monopolistic position protected by both the State and Federal governments. We believe that any such governmentally protected monopoly is forbidden by the Constitution from engaging in racial discrimination. It is true that this Court has never so held but that is only because virtually all such monopolies are subject to common law or statutory prohibitions of discrimination. It is unthinkable that, if these prohibitions were removed by statute, a railroad could refuse to serve any passenger solely because of race.

We shall not elaborate on these points because this brief is restricted to a single question which is common to all these prohibitions of discrimination; namely, whether they are satisfied when "separate but equal" facilities are offered. In the *Plessy* case, this Court held that they were, at least with respect to the Fourteenth Amendment. While the present case can probably be decided without overruling the *Plessy* case, as we show below, the factual premises and legal conclusions of that decisio can not be ignored altogether. We turn first, therefore, to an examination of those premises and conclusions.

The result in the *Plessy* case rested on what we believe to have been a series of errors. First, the Court made the startling assumption that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish distinctions based on color" (162 U. S., at 544). We show below that this statement is historically false (pp. 10-14). The Court then held that segregation could be legally justified as an exercise of the police power or on the ground that the facilities offered are in fact equal and thus satisfy the constitutional requirement of equality. We discuss this argument at pages 15-16. Finally, the Court recognized that the requirement of equality could not be satisfied by a system of segregation which created or maintained inequality. The Court declared that "Every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith and for the promotion of the public good and not for the annoyance or oppression of a particular group." 163 U. S., at 550. In finding, however, that a law requiring segregation on railways was constitutional, it made the factual and sociological assumption that such segregation would "not necessarily imply the inferiority of either race to the other." *Id.*, at 544. We show below (pp. 17-26) that this assumption has been exploded in the 50 years which have elapsed since it was made.

The net effect of the *Plessy* decision was to measure the constitutional command of equality mechanically in terms of physical dimensions and quantity. As a result it has infused rigid, caste stratifications into our laws, our institutions, our conduct and our habits of perception until "the Negro is segregated in public thought as well as public carriers." Moton, *What the Negro Thinks*, 1929, page 55. We submit that what the President's Committee on Civil Rights called "the 'separate but equal' failure" (Report, *To Secure These Rights*, 1947, p. 79) should be reexamined by this Court and that *Plessy* v. *Ferguson* should be overruled.

A. The Framers of the Fourteenth Amendment Intended Thereby to Prohibit Segregation

Plessy v. *Ferguson* cannot be squared with the temper and philosophy of the 1860's which created the Fourteenth Amendment. See Note, *Is Racial Segregation Consistent With Equal Protection of the Laws?* 49 Columbia L. R. 629. It is in fundamental conflict, for example, with *Railroad Co.* v. *Brown*, 17 Wall. 445. In that case, Brown, a Negro, sued for damages for exclusion from a railroad car in the District of Columbia. The Federal statute, 12 Stat. 805, enacted in 1863, in the midst of the Civil War, authorized the railroad to operate and provided that "no person shall be excluded from the cars on account of color." The railroad ran two identical cars on a train, one for Negroes and the other, from which it excluded Brown, for whites. The trial Court specifically refused to instruct, as the railroad requested, that if the cars were "really safe, clean and comfortable," the railroad should prevail. In the trial court the plaintiff was awarded substantial damages for the exclusion. This Court affirmed, terming the segregation "an ingenious attempt to evade compliance with the obvious meaning of the requirement." It held that

to force Negro passengers into separate cars was discrimination incompatible with the equality demanded by Congress. Thus, this Court held that separate but equal accommodations have the same legal effect as the total exclusion of Negroes from transportation.

That those responsible for the enactment of the Fourteenth Amendment rejected segregation was further evidenced by the passage of the Civil Rights Act of 1866. Like the Amendment itself, this Act was designed to eliminate the distinctions contained in the Black Codes passed by the Southern State governments during the post-Appomattox months of 1865. *Slaughter House Cases*, 83 U. S. 36, 70. These codes, among other provisions, placed limitations on Negro rights to own property, to institute law suits or to testify in any proceedings. They applied greatly different penalties to Negroes than to whites for the same offenses. See McPherson, *Political History of the United States During Reconstruction*, Chapter 4. To prevent these distinctions, a civil rights bill was introduced forbidding these and related practices and forbidding also, in a general phrase, any discrimination as to civil rights. S. 61, 39th Congress, First Session. Senator Howard, who had participated in drafting the Thirteenth Amendment, supported the bill, declaring that "in respect to all civil rights, there is to be thereafter no distinction between the white race and black race." Congressional Globe, 39th Congress, First Session, 504. Senator Trumbull, who introduced the civil rights bill, asserted "* * * the very object of the bill is to break down all discrimination between the black men and white men." *Ibid.*, page 599. The bill passed the Senate but ran into difficulties in the House, partly because it was felt that "civil rights" encompassed a scope too broad to be supported by the Thirteenth Amendment. The final bill, therefore, was limited to the elimination of the named abuses with the general and vague reference to civil rights

omitted. 14 Stat. 27. The significance of this statute, in the interpretation of the Fourteenth Amendment, has recently been described by this Court (*Hurd* v. *Hodge*, 334 U. S. 24, 32, footnotes omitted):

> "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy."

Almost immediately following ratification of the Fourteenth Amendment and pursuant to the grant of authority contained in its fifth section, Senator Sumner of Massachusetts introduced a proposal expanding and articulating the rights implicit in the new amendment. During argument on this bill, which later became the Civil Rights Act of 1875, Sumner enunciated his attitude toward racial segregation. He spoke as one of the leaders who had achieved the passage of the Fourteenth Amendment and who might be supposed to know it best; he was supported by what he believed was the unavoidable intention of the Amendment. Sumner lashed out at what he called the "excuse, which finds Equality in separation" by declaring (Cong. Globe, 42nd Cong., 2nd Sess., 382-383):

> "Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries — *these are the artificial substitutes for Equality;* and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded. * * * Assuming what is most absurd to as-

> sume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. *It is Slavery in its last appearance.*"

In the debates which ensued, Sumner's views were upheld and the leading cases on which this Court subsequently relied in *Plessy* v. *Ferguson,* although pressed upon Congress, were rejected as unsound. *Roberts* v. *Boston,* 5 Cush. 198 (1850), and *State* v. *McCann,* 21 Ohio St. 198 (1872), both of which defend segregation practices, were mentioned by name and expressly refuted. See Congressional Globe, 42nd Cong., 2nd Sess., at 3261, and 2 Congressional Record 3452 (43 Cong., 1st Sess.). Yet, in concluding that, "'in the nature of things,'" the Fourteenth Amendment was not "intended to abolish distinctions based upon color" (163 U. S., at 544) this Court explicitly relied upon the *Roberts* case!

Nor may the *Plessy* theory that the Fourteenth Amendment was not intended to abolish race distinctions be squared with the recent decisions of this Court. In *Hirabayashi* v. *U. S.,* 320 U. S. 81, 100 (1947), it was said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Except for the decisions which rely uncritically upon *Plessy* v. *Ferguson,* this Court has consistently maintained that the Fourteenth Amendment prevents States from

establishing racial distinctions as a basis for general classifications. *Takahashi* v. *Fish & Game Commission*, 332 U. S. 410, 420; *Oyama* v. *California*, 332 U. S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U. S. 1, 20, 23; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374; *Buchanan* v. *Warley*, 245 U. S. 60, 82; *Hill* v. *Texas*, 316 U. S. 400, 404. These cases merely embody the basic constitutional principle applicable in all other areas that governmental classifications must be based upon a significant difference having a reasonable relationship to the subject matter of the statute. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417; *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 155; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559, 560.

More specifically, the *Plessy* segregation principle cannot be squared with *Buchanan* v. *Warley*, *supra*, and *Shelley* v. *Kraemer*, *supra*, in both of which this Court refused to apply the separate but equal doctrine to housing. It did so not on the theory that land and houses are *sui generis*, but on the broad ground that "equal protection of the law is not achieved through the indiscriminate imposition of inequalities." *Shelley* case, 334 U. S., at 22. This terse holding, as has been cogently argued, completely destroys the basis of the *Plessy* decision. *Restrictive Covenants and Equal Protection—The New Rule in Shelley's Case*, 21 So. Cal. L. R. 358 (1948).

B. The Legal Principles Which Formed the Basis of the *Plessy* Decision Were Erroneous

The *Plessy* decision sought to justify state segregation statutes both as exercises of the police power and on the theory that, since they restricted all races alike, they satisfied the constitutional requirement of equality (163 U. S., at 544, 546). Neither theory bears examination today.

Particularly vulnerable is what this Court recently called the "convenient apologetics of the police power."

Morgan v. *Virginia*, 328 U. S. 373, 380, citing *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. In *Buchanan* v. *Warley* this Court said (245 U. S., at 74): ". . . the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution . . ." See also *Shelley* v. *Kraemer*, 334 U. S., at 21.

With the elimination of the police power, the *Plessy* doctrine must rest on the sole ground that segregation operates with equal stringency on the groups doing the segregating as well as the groups being segregated. Indeed, it has been noted that "the inclusion of both bases in a single sentence [in the *Plessy* opinion] leads one to wonder whether Mr. Justice Brown ever intended to enunciate the police power basis as an independent proposition sufficient alone to support the statute or whether the basis under which the statute was upheld as a valid exercise of the police power did not rest on the conclusion that the statute did in fact operate equally on all races." *Note*, 21 So. Cal. L. R. 358, 369.

This same article goes on to observe:

> "Despite Mr. Justice Brown's allusion to the State police power, subsequent decisions of the Court clearly indicated that it was the fact of equality of application upon which it would rely. The question next arose with respect to the Oklahoma 'Separate Coach Case.' There the statute, in addition to imposing the requirement of equal but separate accommodations for Negroes and whites, provided that the carrier might maintain sleeping and dining cars for white passengers and not for Negroes, if there should not be sufficient demand for such facilities by Negroes to make their maintenance practicable. The Court upheld the statute insofar as it provided for segregation into equal accommodations, but held that the

statute could not authorize discrimination in the maintenance of luxury facilities, since the discrimination could be maintained *only if it applied equally to all races.* Again, equality of application was made the *sine qua non* of validity, without reference to any reasonable police power basis."

But the "equality" theory has also been destroyed by recent decisions by this Court. In particular, it runs afoul of the statement in the *Shelley* case that equality is not achieved by "indiscriminate imposition of inequalities" (*supra*, p. 15). If this obvious principle is consistently applied, the *Plessy* doctrine must fall.

C. The Factual Assumptions Made in the *Plessy* Decision Were Erroneous

The *Plessy* decision itself recognized that segregation would be unconstitutional if it was designed to or did create a caste system. However, it made the basic factual assumption that it was a "fallacy [to assume] that the enforced separation of the two races stamps the colored race with a badge of inferiority" (163 U. S., at 551).

The best that can be said for this statement is that it was handed down over fifty years ago at a time when the results of applying the separate but equal doctrine could only be surmised. In the ensuing decades, the failure of that prediction has become manifest. If proof of this were necessary, it has been supplied by the developed techniques of the social scientists, all of whom are agreed that segregation has profoundly adverse effects on the Negro community. *Segregation In Public Schools — A Violation of "Equal Protection,"* 50 Yale L. J. 1059, 1061; Gallagher, *American Caste and the Negro College* (1938); Davis and Dollard, *Children of Bondage*, 1940; Woofter, *The Basis of Racial Adjustment* (1925); Bond, *The Edu-*

cation of the Negro in the American Social Order (1934). Surely this Court cannot continue to extend judicial approval to a notion which has been thoroughly discredited in that laboratory which is the nation itself.

(1) Segregated Facilities Necessarily Have a Lower Value

In other areas less controversial and perhaps less significant, our legal system has recognized that mere identity of physical facilities does not necessarily amount to equality either in the economic, political or legal sense. The law would not hold, for example, that an estate has been divided equally between two children each receiving one of the two identical houses comprising the estate, if one of the houses were located in a busy banking district and the other 50 miles from the nearest railroad station. The result would be the same even if the two identical houses were located on the same street opposite each other, but if, for some reason, one side of that street were fashionable and sought after, the other neglected and rejected. Equality is determined in fact and in law not by the physical identity of things assigned in ownership, use or enjoyment but by the identity or substantial similarity of their value.

These legal principles apply not only to property rights but also to political and civil rights. American law demands, in the enjoyment by persons of government-furnished facilities, an equality not less real and substantial than the one it exacts for the protection of heirs, partners or stockholders. "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled"

(*Oyama* v. *California*, 332 U. S. 633). In calling for "equal protection", or for "equal facilities", or for the outlawing of "undue or unreasonable prejudices or disadvantages", the Constitution and the laws of the United States call for genuine equality of protection and not for a merely formal or physical identity of treatment.

The important factors to be considered in assessing the equality of the treatment accorded various groups in our society are the ideas or expectations which are stimulated by that treatment, and the conception conveyed to each minority of the role it is being called upon to play. It is undeniably true that in the South, when the Negro was considered chattel property, any relation of the most intimate degree between white and Negro could be entered into with impunity. Even today Negro servants still may approach as close as necessary to the white persons being served without untoward social consequence. Yet it is equally true that merely "shaking a black hand may be very repulsive to a white man if he surmises that the colored man conceives of the situation as implying equality." Johnson, *Patterns of Negro Segregation*, 1943, page 208. Clearly it is the social definition of the situation that accounts for the difference. Those who insist upon the caste system in our society freely and unstintingly agree to the ritual of equal physical facilities so long as somehow there is also an accompanying communication that inferiors are to remain inferiors.

Segregation provides the ready vocabulary for that communication. It is a vocabulary effectively understood by all. Segregation provides a graphic and literal response to the demand of the white world that Negroes be kept "in their place." To the whites the enforced separation of races is clearly understood as a symbolic affirmation of white dominance, dominance which, to keep itself alive, demands as tribute the continuous performance of the racial etiquette. See Doyle, *The Etiquette of Race*

Relations (1937). Similarly, Negroes appreciate the implications of segregation (Stouffer, *Studies in Social Psychology in World War II*, Vol. 1, p. 566), resent its slur (Moton, *supra*, pp. 238-239), and resist it as a none too subtle mechanism for anchoring them in inferiority (Davis and Dollard, *Children of Bondage* [1940], p. 245).

A Southern attorney has observed of Negroes, "I don't object to their having nice things, but they would not be satisfied with the finest theatre in the world . . . They don't want things for themselves." *Johnson, op. cit., supra*, at page 217. This is, of course, both accurate and perceptive. Negroes desire access to the world of all, not to one just as good.

It is, therefore, easy to understand the general belief in both the white and Negro communities that the facilities relegated to the segregated group are made inferior by the very act of separation. We have long known that the value and desirability of many objects, facilities, traits or characteristics may depend not so much upon their intrinsic qualities or defects, advantages or shortcomings as upon their association with, or use by, persons enjoying a certain reputation. The desirability of a beautiful resort may be lessened by its being visited by people deemed of "low" social standing. If a group considered "inferior" by the prevailing community sentiment adopts any given color of garment, accent of speech, or place of amusement, that color, accent or place will automatically be shunned by the majority and become less desirable or valuable.

If the Nazis, while proclaiming the essential inferiority of the "Jewish Race", had compelled Jews to wear clothes of one color while reserving another to the master race, it could not have been said that Jews received equal clothing facilities. Nor would the discriminatory and humiliating character of the measure depend on whether the colors were brown for the Jews and black for the others, or vice

versa. The exclusive allocation of a given color, any color, to a race declared "inferior" would make that color less desirable. The inferiority thus transmitted from the wearer to the garment would destroy the genuine "equality" of the furnished facilities. The Nazis understood this fully; they achieved much the same effect when they imposed on Jews the wearing of the Yellow Star of David. *Polizei-verordnung uber die Kennzeichnung der Juden vom* 1., September, 1941, RGBI, I. S. 547, Ausgeg. am 5. IX. 1941.

We do not agree that the physical facilities furnished segregated groups are ever in fact equal (*infra*, pp. 29-30). But even assuming, *arguendo*, that those enforcing the segregation policy were lavish in their expenditures, they would not thereby attain real equality of treatment. The five-foot partition in the present case dividing the dining car into Negro and white portions serves a more fundamental purpose than the mere physical separation of white from Negro and the elimination of any likelihood of physical contact. It serves as a ceremonial separation of the dominant from the subordinate and it marks the outside limits beyond which tolerance is impermissible. Under these circumstances the quality of the silverware, glassware, or linen becomes irrelevant. Separation stamps the trappings of equality with the unmistakable sign of inferiority.

In sum, segregation is the artifice by which a dominant group assures itself of its own worth by insisting on the inferiority of others. Segregation, like slavery, has as its function "the fact that it raises white men to the same general level, that it dignifies and exalts every white man by the presence of a lower race". Jefferson Davis, quoted in *Jenkins, Pro-Slavery Thought in the Old South* (1935), at page 192.

(2) Even if the Facilities Are in All Respects Equal in Value, Segregation Is Discriminatory Because of the Adverse Effects Which It Has On the Negro Community

The unconstitutional inequality of segregation may be shown without reference at all to the facilities provided. The inequality appears in the depressing effect which it has on the individual members of the Negro community.

A survey of professional sociological, anthropological and psychological opinion on this subject has been conducted by Drs. Max Deutscher and Isadore Chein of the Commission on Community Interrelations of the American Jewish Congress. Eight hundred and forty-nine social scientists were polled, including the entire membership of the American Ethnological Society, the Division of Personality and Social Psychology of the American Psychological Association, and all of the members of the American Sociological Society who listed race relations or social psychology as their major field of interest. Returns were received from 517, or 61% of the number sent. 90% of the respondents indicated their opinion that enforced segregation has detrimental psychological effects on segregated groups even though equal facilities are provided. 4% failed to answer the item and only 2% indicated that segregation is free of such detrimental effects. Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 The Journal of Psychology 259 (1948).

On the basis of what they have seen and know, these social scientists united in rejecting the separate but equal doctrine as a serviceable formula. In responding, many of them amplified their answers with additional comment. Those who conducted the survey remark that "the gist of these comments was the emphasis on the essential irrelevance of the physical attributes of the facilities fur-

nished". Deutscher and Chein *op. cit., supra,* at page 280. The comments are quoted extensively in the article.

The detrimental psychological effect is not hard to explain. Bearing the approval of this Court, the "separate but equal" doctrine has supplied the rationale for a detailed and exhaustive oppression of the Negro population of the South. Dr. Reid has shown that where racial segregation is established:

> ". . . every aspect of life is regulated by the laws on race and color. From birth through education and marriage to death and burial there are rules and regulations saying that you are born 'white' or 'colored'; that you may be educated, if colored, in a school system separated on the basis of race and 'as nearly uniform as possible' with that available for whites; that you may marry a person of your choice only if that person is colored, this being the only celebration of marriage a colored minister of the gospel may perform; and that when you die (in Atlanta, at least) you may not be buried in a cemetery where whites are interred.
>
> "But that isn't all. Between birth and death colored persons find that the law decrees that they shall be separated from white persons on all forms of transportation, in hotels or inns, eating places, at places of recreation or amusement, on the tax books, as voters, in their homes, and in many occupations.
>
> "To be specific, it is a punishable offense in Georgia for a barber shop to serve both white and colored persons, or for Negro barbers to serve white women or girls; to bury a colored person in a cemetery in which white people are buried; to serve both white and colored persons in the same restaurants within the same room, or anywhere under the same license. Restaurants are required to display signs reading *Licensed to serve white people only,* or

Licensed to serve colored people only. The law also declares that wine and beer may not be served to white and colored persons 'within the same room at any time'. Taxis must be marked *For White Passengers Only,* or *For Colored Passengers Only.* There must be white drivers for carrying white passengers and colored drivers for carrying colored passengers" (Ira de A. Reid, *Southern Ways,* Survey Graphic, Jan. 1947, p. 39).

Dr. Reid's list, of course, is not exhaustive. See, for example, the first six chapters of Johnson, *op cit., supra.* Myrdal asserts that no one can yet estimate the extent of discriminatory practices in the United States. Myrdal, *An American Dilemma* (1944), at 1359.

This carefully contrived web of deprivation and distinction confronts the Negro at every turn. The "thousand and one precepts, etiquettes, taboos and disabilities [which] * * * express the subordinate status of the Negro people and the exalted positions of the whites" (Myrdal, *op. cit., supra,* 66) have a shattering effect upon the Negro personality. DuBois, *Dusk of Dawn* (1940), pages 130-131. "The Negro in America and in general is an average and ordinary human being who under a given environment develops like other human beings." *Black Reconstruction* (1935), Foreword. He is, therefore, understandably warped by living in a world which blatantly advertises its convictions of the Negroes' inferiority. Segregation stimulates a variety of unhealthy responses. It may tend to induce withdrawal, thus extending the isolation of Negroes in America and widening the gap between the racial communities. Myrdal, *op. cit., supra,* page 28. "The Negro genius is imprisoned in the Negro problem" (*Ibid.*). See also Johnson, *An Autobiography of an Ex-Colored Man* (1927), p. 21; Tuck, *Not With The Fist* (1946), p. 107.

Segregation has equally devastating effects when it induces submission rather than rebellion—when it leads to

acceptance of the inferior status defined in the institutions of the dominant community. This attitude invariably stultifies Negro growth and encourages indifference, apathy and unwillingness to compete.

> "Accommodation involves the renunciation of protest and aggression against undesirable conditions of life and the organization of character so that protest does not appear but acceptance does. It may come to pass in the end that the unwelcome force is idealized, that one identifies with it and takes it into the personality, that some time it even happens that what is at first resented and feared is finally loved. In this case a unique alteration of the character occurs in the direction of masochism". Dollard, *Caste and Class in a Southern Town,* at page 255.

Finally, the deleterious effects of segregation find inexorable expression in a deep sense of personal insecurity. Fear of his own inadequacy turns the Negro against the whites who have inflicted his frustration, against his own people for providing a heritage of pain or against himself in an over-weaning guilt for his own secret wishes to be free of his burden.

One psychologist has noted particularly the deep resentment induced by the discrepancy between the vaunted American creed that all are created equal and the bitter fact of subjugation through segregation:

> "The effects of this enforced status on the level of self-esteem, on feelings of inferiority and personal insecurity, the gnawing doubts and the compensatory mechanisms, the blind and helpless and hard to handle more or less suppressed retaliatory rage, the displaced aggression and ambivalence toward their own kind with a consequent sense of isolation and of not belonging anywhere—all of these and much more are bad enough, but the ambiguity of status created by

a society which insists on the fact that all men are born free and equal, and then turns about and acts as if they were not is even worse. The constant reminder—and even boasting—of this equality acts like salt upon a raw wound and, more basically, places them in a profoundly ambiguous and unstructured situation. Human beings simply cannot function efficiently in such situations if they have strong feelings and are strongly motivated—as many, if not most or all, members of discriminated against minority groups are—with regard to these situations." Deutscher and Chein, *op. cit., supra,* at page 272.

Psychic injury always accompanies segregation. We think it patent that as between a system which imposes such penalties and one which does not, there can be no talk of equality.

POINT II

A requirement of equality can never be satisfied by segregated facilities because the official act of segregation of itself gives superior value to the facilities assigned to the dominant group.

We have shown above that the separate but equal doctrine has in fact resulted in inequality and the creation of a caste system. We show here that that is an inevitable result of officially imposed segregation and that since the discrimination flows from official action, it is unconstitutional.

While the segregation in the present case was originally formulated by a private agency, the railroad, it has the same status before this Court as governmentally imposed segregation. We have stated the reasons for this

equivalence above (p. 9); namely, that the railroad's regulation was approved by the I. C. C. and that the railroad is a state-created monopoly which may not discriminate.

A. An Official Policy of Segregation Would Be Unconstitutional if Maintenance of Racial Superiority Were Proclaimed as Its Purpose

It can hardly be disputed that an official regulation providing for the confinement of any racial or religious group to separate cars or to certain portions of a single car upon the declared theory that the group is inferior would be discrimination. That much is virtually conceded in the *Plessy* decision (*supra*, p. 17). The official declaration of inferiority would of itself establish an inferiority of value substantial enough to have constitutional significance (*supra*, p. 18). While the declaration of inferiority alone might be immune to constitutional attack it becomes subject to judicial restraint when accompanied by action having a discriminatory effect. The formal assignment of separate areas based on a formal statement of inferiority would be an assignment of facilities inferior *per se* regardless of their physical identity with the facilities assigned to the dominant group.

The situation as here described would not be mere *social* inequality. We may assume that social inequality has antedated the official ruling. But the accompanying declaration of that pre-existing social inferiority and the ensuing action of assignment of facilities, inferior because segregated, amount to the creation of a *legally sanctioned* inequality.

B. The Placing of a Racial or Religious Group in an Inferior Status by Segregation Can Be Accomplished Without an Express Declaration of Such Status

We do not have here, of course, an express statement by the Southern Railway Co. or the Interstate Commerce Commission that the purpose of the segregation is to maintain inequality. Nevertheless, the same results must be reached if that is in fact its purpose or effect. A regulation may not accomplish by indirection what it may not achieve directly. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Guinn and Beal* v. *United States*, 238 U. S. 347, 364; *Myers* v. *Anderson*, 238 U. S. 368; *Neal* v. *Delaware*, 103 U. S. 370.

The failure of a statute or regulation expressly to declare a legal inferiority does not protect it from the scrutiny of the courts. When the reasonableness of a classification endorsed by any governmental body as a basis for action is in question, the courts will look behind the apparent intention to determine whether or not, in fact, an unlawful classification has been made. *Henderson* v. *Mayor*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219 U. S. 219, 244; *Penn Coal Co.* v. *Mahon*, 260 U. S. 393, 413.*

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* Any classification adopted by a governmental body as the basis of official action must be viewed not in the abstract but realistically in the social setting in which it operates. The judge "must open his eyes to all those conditions and circumstances . . . in the light of which reasonableness is to be measured . . . In ascertaining whether challenged action is reasonable, the traditional common law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken." Harlan F. Stone in 50 Harvard Law Review, pp. 4, 24 (1936). See also *Poindexter* v. *Greenhow, supra; Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387-388; *Connor* v. *Board of Commissioners of Logan County, Ohio*, 12 F. (2d) 789, 795. Furthermore, this Court has declared that "where the facts as to the situation and the conditions are such as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance." *Dobbins* v. *Los Angeles*, 195 U. S 223, 240. *Yick Wo* v. *Hopkins*, 118 U. S. 356, is the classical application of this approach to prevent racial discrimination.

The implicit rather than the explicit declaration of inferiority may be made in at least two ways: First, the inferiority may have been established in other official acts. Thus, if statutes, judicial decisions or other official pronouncements declare that a particular race is inferior, the assignment of separate facilities becomes an assignment of inferior facilities. We shall show below that such independent declarations of inferiority have in fact been made.

Second, the regulations may incorporate an already established social stratification. Formal adoption of social classifications of necessity implies the adoption of the meaning inherent in, and inseparable from, the classifications themselves, that of the respective inferiority and superiority of the groups. Whenever law adopts a social classification based on a notion of inferiority, it transforms the pre-existing *social* inequality into *official* inequality. What ensues is official discrimination, a denial of equality before the law, whether or not the statement of inferiority is made openly by the government or inheres in the classification upon which official action is based.

The reason that constitutional inhibitions attach when governments give official sanction to pre-existing social inequalities is that such action causes a change in both the degree and nature of the inequality. Once a social classification based on group inferiority is formally adopted, the ensuing official inferiority will in its turn intensify and deepen the social inequality from which it stems. The actual operation of segregation statutes illustrates this oppressive function of the law. It is well known, for instance, that the doctrine of "separate but equal" facilities has proved to be a mere legal fiction in most cases, that invariably segregation has been accompanied by gross discrimination, and that absolute equality seldom, if ever, exists. For example, the President's Committee on Civil Rights found that the "separate but

equal" doctrine "is one of the outstanding myths of American history for it is almost always true that while indeed separate these facilities are far from equal" ("To Secure These Rights," pp. 81-82).

This situation involves at the same time another kind of vicious circle. The effect of segregation laws makes their spontaneous repeal or amendment a practical impossibility. When a more or less inarticulate social feeling of racial superiority is clothed with the sanction of official regulation, that feeling acquires a concreteness and assertiveness which it did not possess before. The stricter the regulation, the stronger and the more articulate the feeling of social distance. And the stronger that feeling, the stricter the regulation and the more difficult its amendment or repeal. In such a setting, the democratic processes themselves are threatened and no reliance can be placed on their correcting effect. It is this situation which Chief Justice Stone had in mind when, in sustaining an economic measure as presumptively valid, he warned that the decision did not foreclose the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" and whether "similar considerations enter into review of statutes directed at particular religious . . . or national . . . or racial minorities." Accordingly, he noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products*, 304 U. S. 144, 154, footnote 4.

We shall show in the following sections that the system of segregation is in fact designed to maintain inequality.

C. The Segregation of Negroes Maintains an Officially Declared Status of Inferiority and Also a Previously Established Status of Social Inequality

1. Official Declarations of Inferiority

State imposed segregation stems directly from a vestigial theory of the superiority and inferiority of races inherited as a remnant of the institution of slavery. With the freeing of slaves, attempts were made by the dominant white group to preserve its position of ascendancy by the enactment of discriminatory legislation. "It required little knowledge of human nature to anticipate that those who had long been regarded as *an inferior and subject race* would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed." *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (italics supplied). Thus, in the post-slavery period, Negroes were punished with greater severity than whites for identical offenses. See *General Laws under the Seventh Legislature of the State of Texas*, Chapter 1[illegible]. And Negroes were made incompetent as witnesses in proceedings against white persons. *Laws passed by First Legislature of the State of Texas, An Act to regulate proceedings in a District Court*, Section 65. In the State of Texas the abiding conviction of the inferiority of the Negro race is manifest even in its assessment statutes. "Assessors shall receive 3¢ each for each white inhabitant residing in the county * * * 2¢ for each white inhabitant in a town or city and 1¢ for each slave or free person of color." *Laws passed by the First Legislature of the State of Texas, An Act to Provide for the Enumeration of the Inhabitants.*

These official declarations of inferiority have by no means been abandoned by the Southern states. They are maintained and reiterated in the many decisions holding

that the word "Negro" or "colored person" if applied to a white person gives rise to a cause of action for defamation. *Flood* v. *News and Courier Co.*, 71 S. C. 112; *Stultz* v. *Cousins*, 242 F. 794. Every court which has considered the question has held that writing that a white man is a Negro is libelous per se. *Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970; *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 184 Pac. 946; *Hargrove* v. *Okla. Press Pub. Co.*, 130 Okla. 76, 265 Pac. 635; *Flood* v. *News and Courier Co.*, 71 S. C. 112, 50 S. E. 637; *Stultz* v. *Cousins*, 242 Fed. 794 (C. C. A. 6). It is believed that Alabama, Georgia, Illinois, and Kentucky would concur because of expressions in the opinions of their courts. *Jones* v. *Polk & Co.*, 190 Ala. 243, 67 So. 577; *Atlanta Journal Co.* v. *Farmer*, 48 Ga. App. 273, 172 S. E. 647; *Wright* v. *F. W. Woolworth Co.*, 281 Ill. App. 495; *Williams* v. *Riddle*, 145 Ky. 459, 140 S. W. 661. See Mangum, *The Legal Status of the Negro*, 1940, at p. 18.

The attitudes of these courts is clear. "It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality." *Wolfe* v. *Georgia Railway Electric Co.*, 2 Ga. App. 499. Similarly, the highest court of Oklahoma has declared: "In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected unsurmountable barriers between the races when viewed from a personal and social standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy, or contempt, or bring him into more disrepute, than a charge of this character." *Collins* v. *Okla-*

homa State Hospital, 76 Okla. 229. A Texas court has ventured the opinion that, "Although we have no Texas case holding that to falsely charge a white person as being a Negro would be slanderous, yet in view of the social habits, social customs, traditions and prejudices prevalent in this state in regard to the status of whites and blacks in this state, we think such a charge would be slanderous." *O'Connor* v. *Dallas Cotton Exchange*, 153 S. W. 2, 266.

Even more direct proof that the segregation statutes rest on doctrines of racial superiority may be found in the courts' attitude when the statutes are misapplied. Their consistent holding that it is humiliating to require a white passenger to ride in a Jim Crow car betrays official recognition that the facilities are not equal even in the eyes of the law.

Thus, in a Texas case, the court declared, "To withhold from a white lady the right to ride in a coach such as the law requires to be provided for her race and to compel her and her children to ride in one occupied by Negroes for whom under law it is provided exclusively constitutes such a violation of law and breach of duty as to render it liable for damages for such discomfort and humiliation as are proximately caused from such breach of duty." *M. K. T. Railway Co. of Texas* v. *Ball*, 25 Tex. Civil App. 500, 61 S. W. 327. Similar decisions were reached in *Louisville and N. R. Co.* v. *Ritchel*, 148 Ky. 701; *Chicago, R. I. and P. Ry. Co.* v. *Allison*, 120 Ark. 54.

Consistently with these cases, a white passenger could recover damages if he were now required to sit at the dining car table which the railway assures us is now available to appellant. If the law recognizes damage in such a case, how can it, in any sense, view the facilities as equal?

2. The Previously Established Social Inequality

"Supremacy" is not "equality." That proposition needs no elaboration. Yet it is easy to show that the doctrine of segregation is irrevocably linked with the equally widely held, though admittedly unconstitutional, doctrine of "white supremacy." At the very least, it has led to that doctrine, as Justice Harlan predicted in his dissenting opinion in *Plessy* v. *Ferguson,* 163 U. S. at 559-564.

It is consequently not strange that students of segregation statutes uniformly find that they rest on notions of superiority. By segregation "racial and cultural differences between southern whites and slaves were translated into terms of unquestionable superiority and inferiority." Johnson, *op. cit.* p. 158. "Systematic discrimination against a racial minority usually assumes the form of segregation. The subordinate status of the group may, in fact, be inferred from the modes of segregation to which it is subjected." McWilliams, *Race Discrimination and the Law,* Science and Society, Vol. IX, No. 1 (1945). Indeed, the entire pattern of mores governing Negro-white relationships is inexplicable except in the terms that "In the magical sphere of the white man's mind, the Negro is inferior, totally independent of rational proofs or disproofs. And he is inferior in a deep and mystical sense. The 'reality' of his inferiority is the white man's own indubitable sensing of it, and that feeling applies to every single Negro . . . the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order." Myrdal, op. cit. p. 100. Under these conditions "it is fallacious to say . . . that the intention and effect [of segregation] is not to impose any badge of inferiority. . . . When a Negro workingman or woman is seated in the third seat of a street car on St. Charles Avenue in New Orleans and when a white man and woman is seated on the fourth

seat, separated only by a bit of wire mesh ten inches high on the back of the third seat this is a 'separation' that is merely a symbolic assertion of social superiority, a 'ceremonial' celebration.'' McGoyney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Calif. L. Rev. 5 at p. 27 (1945).

It is equally important that those States which have rejected the theory of inferiority by passing laws prohibiting racial discrimination have uniformly interpreted those laws as prohibiting segregation. *Joyner* v. *Moore-Higgins Co.*, 152 App. Div. 266 (N. Y.); *Ferguson* v. *Gies*, 82 Mich. 358; *Bolden* v. *Grand Rapids*, 239 Mich. 318; *People* v. *Board of Education of Detroit*, 18 Mich. 400; *Crosswaith* v. *Berger*, 95 Colo. 241; *Jones* v. *Kehrlein*, 194 P. 55 (Cal.); *Prowd* v. *Gore*, 207 P. 490 (Cal.); *Wysinger* v. *Crookshank*, 23 P. 54 (Cal.); *Tape* v. *Hurley*, 66 Col. 473; *Anderson* v. *Pantages*, 114 Wash. 24; *Randall* v. *Cowlitz Amusements*, 194 Wash. 82; *Baylies* v. *Curry*, 128 Ill. 287; *Pickett* v. *Kuchan*, 323 Ill. 138; *Clark* v. *Directors*, 24 Iowa 67.

In short, the sole importance of segregation is to give whites—no matter how low on the social scale—a sense of power and importance. Dollard, *Caste and Class in a Southern Town* (1937), page 98. This is reflected in the candid admission of a Kentucky court considering statutes requiring segregation in transportation facilities within that State. "It is also beyond dispute that the sentiment reflected in this legislation and in these opinions does not find the end or the perfection of its purpose in mere race separation alone. It goes much further in that, as is shown in the general feeling everywhere prevailing, the Negro, while respected and protected in his place, is not and cannot be a fit associate for white girls or the social equal of the white race. To conditions like these that are everywhere about them as a part of the social order and

domestic economy of the state, courts cannot shut their eyes. They must . . . notice . . . the position of the races and the attitude of the white race toward the Negro." *Axton-Fisher Tobacco Co.* v. *Evening Post*, 169 Ky. 64.

POINT III

The separate but equal doctrine has never been, and should not now be, applied to Section 3(1) of the Interstate Commerce Act by this Court.

This Court has never ruled that the prohibition of discrimination incorporated in Section 3(1) of the Interstate Commerce Act was satisfied by separate but equal facilities. *Hall* v. *De Cuir*, 95 U. S. 485 and *Morgan* v. *Virginia*, 328 U. S. 373 held that state statutes forbidding or compelling segregation are unconstitutional insofar as they apply to interstate carriers because they intrude upon federal control of interstate commerce. *McCabe* v. *A. T. & S. F. R. R. Co.*, 235 U. S. 151, held that a state law requiring discrimination was unconstitutional because it violated the Fourteenth Amendment. *Chiles* v. *Chesapeake & Ohio R. Co.*, 218 U. S. 71, sustained segregation self-imposed by a carrier; but the complainant in that case failed to rely on Section 3(1) and this Court did not refer to it.

Thus, the only case in which this Court has considered racial discrimination under Section 3(1) is *Mitchell* v. *U. S.*, 313 U. S. 80. There it held that the denial of certain accommodations was clearly discriminatory (and hence illegal. Declining to go further, it noted specifically that it was considering "not a question of segregation but one of equality of treatment" (313 U. S. at 94).

We submit that this Court can hold here that segregated facilities do not satisfy Section 3(1) without overthrowing the application of the *Plessy* doctrine to the

Fourteenth Amendment. The language of Section 3(1) unequivocally prohibits any carrier from subjecting any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Obviously this sweeping injunction to be distinguished from the more general provision that no person shall be deprived of "equal protection of the laws."

Indeed we believe that the language of Section 3(1) is closer to that of the statute invoked in *R. R. Co.* v. *Brown*, discussed above (pp. 11-12). The *Brown* case was distinguished in the *Plessy* decision on the ground that the statute there invoked prohibited "exclusion" from the cars (163 U. S., at 546). Clearly that statute is closer in language to the equally explicit terms of Section 3(1) than the "equal protection" clause of the Fourteenth Amendment. We submit that the *Brown* case is a more direct precedent for the present case than the *Plessy* case and requires reversal of the judgment below.

CONCLUSION

It is respectfully submitted that for the reasons stated above the judgment below should be reversed.

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Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE SOUTHERN RAILWAY COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON,
Appellant,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE SOUTHERN RAILWAY COMPANY,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the National Association for the Advancement of Colored People, respectfully move this Honorable Court for permission to file the accompanying brief as *amicus curiae.* Permission has been secured from all parties with the exception of the intervening respondents, the Southern Railway Company, which has refused its consent. (The letters in answer to our request have been filed in the Clerk's office.)

The National Association for the Advancement of Colored People for the past 40 years has devoted itself to the eradication of discrimination based on race and color from all phases of American life. We are dedicated to the belief that enforced racial separation is an ugly blot on American democracy and, consequently, saps it of much of its integrity. Our democracy is strong, not only because of its material wealth, but because the concept of equality and freedom for all has fired the hopes and aspirations of the people of the world. In practice, however, we have fallen far short of our preachments and we, as well as the rest of the world, have become increasingly aware of this fact. Either we must put our own credo into practice, or we must admit that we cannot successfully make these beliefs a part of our everyday life.

From time to time issues are presented to this Court which require that this "American dilemma" be honestly resolved. This is just such an occasion. It is our belief that the racial distinctions and discriminations which the Southern Railway Company is now attempting to enforce under its present regulations, and which the Interstate Commerce Commission and United States District Court approved, are invalid, humiliating to passengers both white and Negroes alike, and directly contrary to the ideals of democratic living to which this country is dedicated.

Robert L. Carter

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Counsel for the National Association for the Advancement of Colored People.

IN THE

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BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE.*

The Opinions Below.

The first report of the Interstate Commerce Commission (R. 184) is reported in 258 I. C. C. 413. The second report (R. 4) may be found in 269 I. C. C. 73. The first opinion by the three judge District Court (R. 63) can be found in 63 F. Sup. 906, and its later opinion from which this appeal is taken (R. 248) is reported in 80 F. Sup. 32.

Jurisdiction.

The jurisdiction of this Court to review on direct appeal the judgment entered in this case is granted under Title 28 United States Code, Section 1253. Appellant's appeal was filed on November 17, 1948, and probable jurisdiction was noted by this Court on March 14, 1949 (R. 266, 269, 278).

Statutes Involved.

Section 3, Subsection 1 of the Interstate Commerce Act makes it unlawful for any carrier subject to the provisions of the Act to make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[1]

Section 1, Subsection 5 makes it unlawful for any carrier to make an unjust and unreasonable charge for services rendered.[2]

Statement of the Case.

Appellant, a Negro, on May 17, 1942, was a Pullman passenger on a train of the Southern Railway Company on a trip from Washington, D. C., to Birmingham, Alabama, as a field representative of the President's Committee on Fair Employment Practices. During the course of the

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[1] "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[2] "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: And provided further, That nothing in this chapter shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

journey, appellant had occasion to seek services in the dining car. At that time, the Southern Railway Company, pursuant to a regulation, issued on July 3, 1941 and a supplemental one issued on August 6, 1942, reserved two tables at the end of the diner, adjoining the kitchen, for Negro passengers for a certain time after the diner opened. If no Negroes presented themselves during that period, white passengers were then seated at these tables, and no Negro passenger could thereafter be served until both tables were no longer occupied by whites. Under no circumstances were Negroes permitted to eat at any of the other tables in the diner. If Negroes came to the diner while both of these two tables were empty, they were seated and curtains were drawn to separate them from the rest of the car until they had completed their meal.

When appellant sought service, the two end tables were then occupied by whites, and he was told that he could not be served but would have to return later. There was, at that time, available space at both tables and at other tables in the diner. There is no question but that had appellant been a white passenger he would then and there have been seated and served. When appellant returned to the diner for the second time, the two end tables were still in use, and the dining car steward informed him that he would send word back to his Pullman seat when he could be served. The steward failed to do this, and the diner was taken off in Greensboro, North Carolina, without appellant having been served at all.

A complaint was then filed with the Interstate Commerce Commission alleging unequal treatment and unjust prejudice and discrimination (R. 80). The Commission found the allegations of the complaint had been sustained, but concluded that a future order would serve no useful purpose and, therefore, dismissed the complaint (R. 184, 195). On

suit to set aside the Commission's order the District of Maryland set aside the order of the Commission on the ground that the regulations did not afford the equality of treatment which the Interstate Commerce Act required (R. 63).

Thereupon, the Southern Railway published a new regulation under which one table is reserved exclusively for Negro passengers at the kitchen end of the diner and will be set off by a wooden partition of approximately five feet in height (R. 223). The Commission, with two members dissenting in part, found that this new regulation provided the equality of treatment which the Interstate Commerce Act required and dismissed the complaint (R. 4-11). The Court below affirmed in a two to one decision, and thereupon appellant sought review in this Court.

Summary of Argument.

The regulation which has been approved as giving to Negro passengers equal treatment required under statutory and constitutional provisions is both discriminatory and unreasonable. Race alone is the basis for its existence. The regulation requires governmental approval. The approval of the regulation by the Interstate Commerce Commission is invalid on constitutional and statutory grounds.

What the carrier contends is that as a result of a survey, it has found that the division of its diners among its white and Negro patrons as provided under its regulation affords the Negro an equitable amount of space. However, the Constitution and the Interstate Commerce Act require that equal treatment be afforded the individual, and whenever a Negro passenger is forced to remain standing when he would have been served had he been white, his right to equal protection has been invaded. Moreover, every pas-

senger is entitled to equal treatment without governmentally-enforced racial segregation.

The carrier must, under the present regulation, determine what it means by the term Negro. The term is subject to varying conflicting statutory definitions, and would subject interstate commerce to the same confusion and burdens which caused this Court to hold state segregation statutes burdensome to interstate commerce in the *Morgan* case. Further, there is less reason for permitting the carrier to make racial distinctions than there is for permitting the states to do so.

The Interstate Commerce Commission sanctioned the regulation and thereby gave to it government support. Our national government is not permitted to make race or color the basis for its action. Governmentally-enforced racial segregation serves no useful purpose. The "separate but equal" doctrine has never provided the equality required by the Constitution. The requirement that Negro passengers, solely because of race, must be confined behind a wooden partition from all other passengers in and of itself is unequal treatment. Our Constitution prohibits such governmentally-enforced segregation.

ARGUMENT.

I.

The present regulation violates the Interstate Commerce Act.

The present regulation sets aside a table for the exclusive occupancy of Negroes at the kitchen end of the dining car while the train is going through those states where segregation is required. From Washington to New York,

Negroes may be served on the same basis as any other passenger. If this regulation is upheld, the Southern Railway Company will install on all of its trains a wooden partition approximately five feet in height which will separate this table and its Negro diners from the rest of the tables and white passengers in the car.[3] Negro passengers, regardless of their number, are required to eat at this table. The rest of the diner is reserved exclusively for whites. This arrangement was made pursuant to a purported survey which showed Negroes to be approximately 3.48 percent of the persons using the diner of the Southern Railway. (See Exhibits, R. 225-247.)

Since respondent's position holds that the present regulation adequately protects Negroes against future discrimination in dining car service, it is very relevant to determine whether the new regulation will insure that the rights of Negro passengers protected by the Interstate Commerce Act will be safeguarded in all circumstances which may

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[3] "Transportation Department Circular No. 142. Cancelling instruction on this subject, dated July 3, 1941, and August 6, 1942. SUBJECT: Segregation of White and Colored Passengers in Dining Cars. To: Passenger Conductors and Dining Car Stewards. Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows: (1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the din shall be reserved exclusively for white passengers. (2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal. (3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules. (4) These rules become effective March 1, 1946. R. K. McClain, Assistant Vice-President."

present themselves in the future.[4] Demonstration of the inadequacy of the present regulation in any situation assures the conclusion that its sufficiency fails to meet the requirements of the Interstate Commerce Act. The present regulation, therefore, must be tested in the light of any and all reasonably foreseeable situations.[5]

The fundamental right to equality of treatment is a right specifically safeguarded by the Fourteenth Amendment to the Constitution of the United States,[6] against the carrier acting pursuant to state laws, and against the carrier acting pursuant to privately promulgated regulations by the express provisions of the Interstate Commerce Act.[7] The right of a Negro passenger guaranteed by these provisions is the right to be served according to the same rules governing all other passengers, a right accruing upon the purchase of the ticket. Where a Negro passenger applies for service and is denied the same at a time when there is a seat available, and is forced to remain standing while a white passenger who subsequently applies is admitted to and served in the same seat denied the Negro passenger, it is clear that the Negro passenger has, on account of his color, been subjected to a disability not suffered by white passengers, and a violation of the Act is patent.

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[4] It is to be noted that there has been no showing of a factual basis demonstrative of the equality claimed to be afforded by the present regulation. The division is based upon a survey made from May 14-24, 1945, and October 1-10, 1946, showing the number of Negroes and whites using the dining car facilities of the Southern Railway (R. 225-247). While this gives some idea as to the approximate volume of Negro patronage in the dining car, there are no means available for determining how many Negro passengers will request service on a particular trip, and the present regulation is insufficient to accommodate an unanticipated volume of Negro traffic.

[5] See first opinion of lower court in this case (R. 76).

[6] *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151.

[7] *Mitchell* v. *United States*, 313 U. S. 80.

Yet, this is what is accomplished under the present regulation as applied to a situation which may be reasonably expected to occur. Where Station 1 is fully occupied by Negro passengers, and Station 2 is wholly or partially occupied by white passengers, a Negro passenger then applying for service is forced to wait, irrespective of the number of vacant seats in the white section. A white passenger presenting himself for service, immediately after the refusal of the Negro passenger, is served without delay.

Nor is it an answer to say that whites also have to wait for seats on some occasions.[7a] The inquiry does not stop at the situation where all seats in the dining car are taken, or where both Negro and white passengers are standing; the character of the right possessed by the Negro passenger who stands while all whites are seated, and while there is space for him in the "white" section, clearly makes the difference.[8] Equal protection is not met by saying to the Negro passenger applying for accommodations in a sleeper,

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[7a] Equality of treatment is not granted because there is between whites and Negroes an "indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

[8] "We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic'. But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws—not merely a group of individuals or a body of persons according to their numbers. And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations." *Mitchell* v. *United States*, *supra*, at page 97.

at a time when such accommodations are available to whites, that he may travel tomorrow;[9] nor is it accomplished by telling the Negro student who seeks a legal education, at a time when such facilities are immediately available to whites, that he may study later.[10] The conclusion seems inescapable that the right to dining car service must be afforded when the passenger presents himself, if facilities for affording service are then available anywhere in the car.

Appellant is entitled to and seeks a guarantee of the same service in every respect which is accorded white passengers under like conditions. This includes, among other things, the right to receive the same service and to be served as expeditiously.[11] Earlier regulations of the Southern Railway fell short of affording this needed protection, and it is believed that the inadequacy of present regulations is equally clear.

A review of the history of regulations of the carrier as to dining car service for Negro passengers demonstrates the discrimination which has inevitably accompanied its segregation policies. First in point is its practice of many years' duration of serving meals to passengers of different races at different times, Negro passengers being served either before or after the service of white passengers was completed (R. 186). The fact that the period required for the service of white passengers extended into the next meal period, completely obliterated all possibilities of service of Negro passengers and finally forced modification of this practice as accomplished by its regulation of July 3, 1941, which in turn was found lacking by the Commission and the

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[9] *Mitchell* v. *United States*, *supra*, at page 97.

[10] *Sipuel* v. *Board of Regents*, 332 U. S. 631.

[11] *McCabe* v. *Atchison T. & S. F. Ry. Co.*, *supra*; *Mitchell* v. *United States*, *supra*.

District Court.[12] The supplemental regulation of August 6, 1942, in force at the time appellant was refused service met the same fate in court.[13] Experience as to the regulations of the carrier demonstrates that only by a wide and radical departure from its practices pursuant to its previous regulations will illegal discriminations be avoided. It is apparent, however, that no such change is sought to be accomplished by the regulation under inquiry. The inadequacy of the regulation under consideration becomes more apparent when examined in light of its inflexible character, even though there is a variance in the number of Negro passengers travelling on a given train or seeking service in a particular diner. No matter how many Negro passengers seek or desire service in the dining car, no matter whether they seek service singly, in couples or in larger

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[12] Dining Car Regulations at R. 186: "Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartment set aside for them." As to this regulation the lower court said at R. 78: "The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car."

[13] Dining Car Regulations at R. 186: "On August 6, 1942, these instructions were supplemented as follows: Effective at once please be governed by the following with respect to the race separation curtains in the dining cars: Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains. These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables. After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated. 'Reserved' cards are being supplied you." This regulation was also found inadequate by the lower court (R. 63).

groups, under respondent's present regulation the same disposition must be made in each instance. They must wait until there is room at the single table for four reserved exclusively for their benefit behind the wooden partition. In each of these situations it appears that the number of seats then available in the white section is immaterial since under no circumstances will the overflow demand of Negro passengers waiting for dining car service be taken care of except at the table for four.

Such situations will, in the very nature of things, constantly present themselves, and their proposed disposition by respondents is intolerable. Incessant delays in obtaining a seat at this one table are inevitable, and for many Negroes the procuring of a seat will be impossible. For those who are fortunate enough to obtain a seat, there will remain the consequent lack of expediency in service. The exercise of the privilege of dining with one's friends, a matter of course among whites, becomes for the Negro an extraordinary accomplishment. When the seats reserved exclusively for Negroes are in use and seats reserved for whites are empty, it is clear that a Negro seeking service in respondent's diner, on being denied such service at one of the empty seats, has been afforded discriminatory treatment on the basis of race and color in violation of the Interstate Commerce Act.[14]

The best that can be said for this regulation is that it is based on a very limited survey indicating the habits of a racial group made with respect to the use of the dining car service. However, the Interstate Commerce Act and the Constitution secures and protects individual rights, and where an individual is discriminated against the Act and the Constitution is violated regardless of how accurate or

[14] See *Mitchell* v. *United States*, *supra*.

exact may be the arrangement regarding the group with which he is identified. We believe that the carrier's past regulations show that the equal treatment to individual passengers which the Interstate Commerce Act requires, cannot be secured except under an arrangement whereby all passengers, regardless of race and color, have the same accommodations, service and treatment available. The only rule governing the availability of accommodations should be the democratic rule of "first come—first served" rather than consideration of race and color.

When appellant bought his ticket for a journey over the Southern Railway between Washington, D. C., and Birmingham, Alabama, in addition to his seat and berth in a Pullman car, he was entitled to all other services and accommodations incident thereto, including the right to dine in the carrier's diner. The record shows that pursuant to regulations then in force, appellant was not permitted to eat in the dining car because of his race and color. White persons, on the other hand, paying the same charges and fare, were permitted to dine in the diner as a matter of course. It is now not disputed that appellant was subjected to an undue preference and prejudice proscribed under Section 3 of the Interstate Commerce Act. The further conclusion is equally inescapable that white persons received greater service, comfort and convenience than appellant and other Negro passengers, paying the same charges and fare and entitled in all respects to like accommodations, comforts and conveniences. Clearly this is a basis for inquiry concerning the reasonableness of the fare exacted as required under Section 1. Further there can be no doubt that appellant and other Negro passengers were receiving less service and comfort than whites paying the same fare and were therefore being charged greater compensation for the transportation than were white passengers.

Under the new regulation which was the subject of further hearing before the Interstate Commerce Commission, these violations have not been cured as indicated, *supra*. Appellant and other Negro passengers who are using, or who in the future will use, respondent's train are and will be subjected to undue prejudice and disadvantage, will receive less service, comfort and convenience than white persons paying the same fare. Appellant contends that this disproportion amounts, and will amount, to a violation of Section 1 (5) as well as Section 3 of the Act.

II.

The present regulation constitutes a burden on interstate commerce in the same manner and to the same extent as the state statute which was struck down in *Morgan* versus *Virginia*.

The same factors which influenced this Court in declaring that the states are without authority to require the separation of races in interstate commerce are at work with equal force when the effect of a carrier regulation enforcing such segregation is considered. In *Morgan* v. *Virginia*,[15] this Court found that one of the main vices of giving effect to local statutes enforcing segregation in interstate commerce was the difficulty of identification.[16] That difficulty is no less when the separation is attempted under a carrier regulation rather than under a state statute.

The carrier in order to enforce the present regulation must define what is meant by the term "Negro" or "colored" person. Appellant, in the instant case, travelled through five states, Virginia, North Carolina, South Caro-

[15] 328 U. S. 373.
[16] *Ibid* at pages 382, 383.

lina, Georgia and Alabama en route to his destination, Birmingham. In Virginia, Georgia and Alabama the term "Negro" or "colored" person includes all persons with any ascertainable amount of Negro blood.[17] In North Carolina this term embraces all persons with Negro blood to the third generation inclusive,[18] whereas in South Carolina 1/8 or more of Negro blood is enough to classify one as a "Negro" or "colored person".[19]

If, therefore, the carrier attempts to enforce the proposed regulation in accord with state policy, it will have to adopt the definitions of all states along the route over which the suggested regulation is to operate.

The record does not show that the carrier here involved has at any time attempted to formulate a definition or test by the application of which a passenger may be determined as a white person or Negro within the meaning of the regulation in question. But even if this were so, the situation would not be helped. The carrier regulations would

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[17] Ga. Laws, 1927, page 272; Ga. Code (Michie Supp.) 1928, Sec. 2177; Va. Code (Michie) 1942, Sec. 67; Ala. Code, 1940, Title 1, Sec. 2 and Title 14, Sec. 360.

[18] N. C. Gen. Stat. 1943, Secs. 51-3 and 14-181 (marriage law); but see N. C. Gen. Stat. 1943, Sec. 115-2 (separate school law) for a different definition of the term.

[19] S. C. Const., Art. III, Sec. 33 (intermarriage). If the trip were continued to New Orleans, Louisiana, the rule is not clear. It was first held that all persons, including Indians, who were not white were "colored". *Adelle* v. *Beaugard*, 1 Mart. 183. In 1910 it was held that anyone having an appreciable portion of Negro blood was a member of the colored race within the meaning of the segregation law. *Lee* v. *New Orleans G. N. Ry.*, 125 La. 236, 51 S. 182. In the same year, however, it was decided that an octoroon was not a member of the Negro or black race within the meaning of the concubinage law (La. Act, 1908, No. 87). *State* v. *Treadaway*, 126 La. 300, 52 So. 500. Shortly after the latter decision, the present concubinage statute was enacted substituting the word "colored" for "Negro". La. Acts, 1910, No. 206, La. Crim. Code (Dart), 1932, Arts. 1128-1130. The effect of the change is yet to be determined.

necessarily be even less precise in this regard than a state segregation statute. It is also perfectly clear that, as between different carriers and their respective segregation regulations, there are bound to be a multiplicity of variations of definitions of passengers as white and colored, and a multiplicity of variations in the ascertainment of passengers as white and colored. The dining car steward makes the determination as to the race of a passenger who seeks to dine in his car, and as between different stewards there is bound to be variations in the enforcement of the regulation. One steward might consider a passenger a white person and another steward might consider the same passenger a Negro within the meaning of the regulation. One thing is clear, whether the carrier follows the state definitions or adopts its own, it makes itself subject to burdensome litigation.[20] Hence, it is clear that the proposed regulation is as objectionable and as burdensome to commerce as the Virginia statute voided in the *Morgan* case.

There is, moreover, even less reason for giving effect to a carrier regulation than to a state statute. None of the factors which are said to give validity to a legislative judgment which is expressed in segregation laws are operative where carrier regulations are involved. If respondent fears, as suggested before the Interstate Commerce Commission and in the lower court, that the co-mingling of Negro and white passengers will result in breaches of the peace, there is no reason advanced to show that the states along respondent's route are without power to handle or control

[20] See *Louisville & N. R. R.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411 (1912); *Missouri K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago R. I. & P. Ry. Co.* v. *Allison*, 210 Ark. 54, 178 S. W. 401 (1915) where punitive damages were afforded white persons for mistaken placement in colored coaches. Regardless of the definition used the carrier will be liable in damages unless its definition is a correct one as determined by the law of the applicable forum.

such incidents and to protect respondent's property.[20a] National interests in maintaining commerce free of burdens and obstructions, must prevail over carrier regulations as well as state statutes. Hence under the rationale of the *Morgan* case, it must logically follow that neither a state nor a carrier has authority to burden interstate commerce by the enforced segregation of passengers in interstate commerce.

III.

Sanction of this regulation by the Interstate Commerce Commission constitutes governmental action within the reach of the Fifth Amendment.

With the passage of the Interstate Commerce Act, the Congress established the Interstate Commerce Commission to exercise its authority with respect to interstate commerce within the terms of the statute.

Under Section 1 (13) the Commission is authorized by general or special orders to require all carriers by railroad subject to the provisions of the Act to file from time to time their rules and regulations with respect to car service, and the Commission may in its discretion direct that such rules and regulations be incorporated in their schedules showing

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[20a] Nor may we add is there any reason to anticipate trouble. The Southern Railway is no local carrier but operates over one of the main arteries of travel connecting the North and South. People from states having civil rights statutes as well as those from states which practice segregation use its facilities. Negro passengers, at least since *Mitchell* v. *United States*, *supra*, have used its Pullman facilities without segregation and without any infractions of the law taking place. Service in its diner without segregation will not force any white person who does not desire to sit down and eat with a Negro.

rates, fares, and charges for transportation and be subject to any and all provisions of this chapter relating thereto.[21]

The Commission is further authorized under Section 1 (14) after hearing a complaint or on its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car services by carriers by railroads subject to this chapter.[22]

Under Section 3 (1) Congress has declared it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person.

Under Section 1 (5) the carriers subject to the Act are required to charge reasonable and just rates for services. The Commission has the authority and the duty of seeing to it that these provisions are carried out, and it may determine on its own initiative or on the complaint of an individual party whether a purported regulation or a regulation in force is in keeping with the requirements of the Act.

From the decisions of this Court, it is clear that Congress intended to reach all forms of discriminatory practices made by carriers subject to the Interstate Commerce

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[21] Sec. 1 (13) provides—Rules and regulations as to car service to be filed, etc.—The commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto.

[22] Sec. 1 (14) provides—Establishment by commission of rules, etc. as to car service.—The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices.

Act.[23] Regarding such practices, it is clear that discrimination because of race and color is prohibited. There is no question but that Congress has therefore occupied the field and that private or state regulations contrary to the congressional purpose must fall.[24]

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[23] *Mitchell* v. *United States*, *supra*, at pages 96, 97.

[24] This has been the rule since *Gibbons* v. *Ogden*, 9 Wheat 1. In this connection it seems important to note that while this Court on occasion has questioned certain of its own earlier distinctions between direct and indirect impositions, the fact that exercise of control over interstate commerce is the purpose and objective of a questioned state statute, and that its enforcement is achieved by interference with interstate movement itself, militates strongly against the validity of the statute. This is because such an impact necessarily involves some invasion of the national interest in maintaining the freedom of commerce across state lines. If this fact alone is not conclusive, it at least suffice to establish the impropriety of the state regulation until and unless it is shown that urgent considerations of local welfare take a particular case out of the general rule. See *Pennsylvania* v. *West Virginia*, 262 U. S. 553, especially 596, 597; *Bob Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, follows the same rationale. There it was felt that commerce was so peculiarly local that there could in no respect be an interference with the control of the United States over foreign commerce. Further, this conclusion seemed to be reached by virtue of the fact that the Michigan statute and public policy was found by the court to conform to the national policy with regard to barring distinctions and classifications based on race and color. On this point the Court said in note 16: "Federal legislation had indicated a national policy against racial discrimination in the requirement, not urged here to be specifically applicable in this case, of the Interstate Commerce Act that carriers subject to its provisions provide equal facilities for all passengers, 49 U. S. C. A. Sec. 3 (1), 10A, F. C. A. title 49, Sec. 3 (1), extended to carriers by water and air, 46 U. S. C. A. Sec. 815, 10 F. C. A. title 46, Sec. 815; 49 U. S. C. A. Secs. 484, 905, 10A F. C. A. title 49, Secs. 484, 905. Cf. *Mitchell* v. *United States*, 313 U. S. 80, 85 L. ed. 1201, 61 S. Ct. 873. Federal legislation also compels a collective bargaining agent to represent all employees in the bargaining unit without discrimination because of race. 45 U. S. C. A. Secs. 151, *et seq.*, 10A F. C. A. title 45, Secs. 151, *et seq.*; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226; *Tunstall* v. *Brotherhood of Locomotive F. E.*, 323 U. S. 210, 89 L. ed. 187, 65 S. Ct. 235. The direction of national policy is clearly in accord with Michigan policy. Cf. also *Hirabayashi* v. *United States*, 320 U. S. 81 L. ed. 1774, 63 S. Ct. 1375; *Korematsu* v. *United States*, 323 U. S. 214, 89 L. ed. 194, 65 S. Ct. 193; *Ex parte Endo*, 323 U. S. 283, 89 L. ed. 243, 65 S. Ct. 208."

The situation which was present when *Hall* v. *DeCuir* was decided is present no longer.[25] There it was felt that state statutes that required equal treatment of passengers in interstate commerce were burdensome on such commerce and that private carriers were free to make their own rules and regulations until such time as Congress had spoken. Congress has now spoken.

It is the duty of the Commission to say whether a regulation provides equality of treatment, and the carrier regulations dealing with this subject matter are of no force or effect without the sanction of the Commission. They can only exist with the sanction of the government. In this case, the Commission specifically approves the present regulation and this is clearly governmental action within the meaning of the Fifth Amendment.[26]

IV.

The government is powerless under the Constitution to make, sanction, or enforce, any distinctions or classifications based upon race or color.

It has been the consistent opinion of this Court that the Constitution requires that all persons similarly situated be treated in a like manner.[27] Thus, where legal distinctions

[25] 95 U. S. 485.

[26] For full discussion of the concept of state action under the Fourteenth Amendment see *United States* v. *Screws*, 325 U. S. 91, and particularly Mr. Justice RUTLEDGE's opinion at pages 113, 114, 115. It is clear the same principle will determine whether there is governmental action under the Fifth Amendment. This issue was raised in *Hurd* v. *Hodge*, 332 U. S. 24, but not decided because the court disposed of the problem without reaching the constitutional question.

[27] See *Truax* v. *Corrigan*, 257 U. S. 312; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Takahashi* v. *Fish and Game Commission*, 332 U. S. 410; *Shelley* v. *Kraemer*, 334 U. S. 1; *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; See also *Hurd* v. *Hodge*, 334 U. S. 24; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210.

are made as between persons or groups, such distinctions must have a rational basis in order to avoid conflict with either the Fourteenth or Fifteenth Amendments. This Court has consistently held that governmental distinctions between persons based upon race or color are arbitrary and unreasonable and cannot stand under the Constitution.[28] Although the Fifth Amendment contains no equal protection clause, it is no longer open to doubt that the United States government is as limited in making race a basis for a legislative enactment as are the states under the Fourteenth Amendment.[28a] It is also now clear from the decisions of this Court that the government cannot be a party to the enforcement of racial distinctions and classifications which are privately promulgated.[29] Although *Hurd* v. *Hodge* was decided without reaching this constitutional question, it seems certain that this Court will find the federal government bound by the same constitutional limitations which is found applicable to the states in *Shelley* v. *Kraemer*.

Only under the rationale of *Plessy* v. *Ferguson*[30] could a contrary decision be reached. That decision gave birth to the much criticized "equal but separate" doctrine, under which enforced racial separation is declared permissible as long as the facilities available for Negroes are equal or

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[28] See cases *supra*, in note 27.

[28a] *Hirabayashi* v. *United States*, *supra*; *Korematsu* v. *United States*, *supra*; and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, *supra*.

[29] *Shelley* v. *Kraemer*, 334 U. S. 1.

[30] 163 U. S. 537.

substantially equal to those available to whites.[31] Of course there can be no question of equal facilities in this case when under the carrier's present regulations a passenger who is a Negro is forced to eat in isolation behind a wooden barrier as if he were unclean or an untouchable.[32] But for more

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[31] *The Report of the President's Committee on Civil Rights* at page 81. "This judicial legalization of segregation was not accomplished without protest. Justice Harlan, a Kentuckian, in one of the most vigorous and forthright dissenting opinions in Supreme Court history, denounced his colleagues for the manner in which they interpreted away the substance of the Thirteenth and Fourteenth Amendments. In his dissent in the *Plessy* case, he said: 'Our Constitution is color blind, and neither knows nor tolerates classes among citizens. * * * ' 'We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of 'equal' accommodations * * * will not mislead anyone, or atone for the wrong this day done. *If evidence beyond that of dispassionate reason was needed to justify Justice Harlan's statement, history has provided it.* Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates educational, recreational and other public services, according facilities to the two races which are 'separate but equal'. *In the Committee's opinion this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal.*" (Italics supplied.)

[32] *The Report of the President's Committee on Civil Rights* at page 79. "Mention has already been made of the 'separate but equal' policy of the southern states by which Negroes are said to be entitled to the same public service as whites but on a strictly segregated basis. The theory behind this policy is complex. On one hand, it recognizes Negroes as citizens and as intelligent human beings entitled to enjoy the status accorded the individual in our American heritage of freedom. It theoretically gives them access to all the rights, privileges, and services of a civilized, democratic society. *On the other hand, it brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people.*" (Italics supplied.)

than 20 years this Court has shown an acute awareness of the dangers and fallacies in *ratio decedendi* of *Plessy* v. *Ferguson* and has moved further away from the philosophy which that case expounded. There is now little doubt but that government cannot now use race or color as a permissible basis for legislative or administrative action. Constitutional limitations in this regard are probably more stringent and inflexible when the national government is involved than when there is a question of permissible state action. The "equal but separate" doctrine should be reexamined and discarded.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed and that the Interstate Commerce Commission should be directed to enter an order prohibiting the railroad from requiring racial segregation of its Negro dining car patrons.

Robert L. Carter

Thurgood Marshall

Attorneys for Amicus Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON; APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, APPELLEES

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, a Member of the Bar of this Honorable Court and of the Committee on the Judiciary of the House of Representatives of the United States, at the suggestion of other Members of that Committee, respectfully moves this Honorable Court for leave to file a brief and participate in the oral argument of the above entitled cause.

SAM HOBBS,
As Amicus Curiae.

OCTOBER 21, 1949.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, APPELLEES

NOVEMBER 7, 1949.

The Court today entered the following order in the case of *Henderson* v. *United States, et al.*, No. 25, October Term, 1949:

"The motion of Sam Hobbs for leave to file a brief as *amicus curiae* is granted. Mr. Justice Douglas took no part in the consideration or decision of this application."

PRELIMINARY STATEMENT

The law of this case is clearly and succinctly stated in the briefs for the Interstate Commerce Commission and for Southern Railway Company.

The Committee on the Judiciary of the House of Representatives of the United States has never taken a contrary position; nor has the Congress or the Supreme Court of the United States.

The brief nominally filed for the United States is not a brief for that appellee and assumes the opposite position from that taken by those representing that appellee in the lower court.

This amicus curiae adopts the briefs of the attorneys for the other two appellees; and opposes the brief nominally filed for the United States.

QUESTION STATED

The sole question for decision on this appeal is whether or not the appellee carrier's rules regulating its dining car service, which became effective March 1, 1946, requiring equal but separate accommodations for white and colored passengers, subject the appellant to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Appellant won his case in the lower court when he attacked a former rule of the carrier; so only the rules which became effective March 1, 1946, are attacked in this case and involved in this appeal.

Or, as stated in the brief for Southern Railway Company, on Page 12, under the caption "The Question Presented for Decision",

> "The appeal brings to this Court for decision the question whether racial segregation of interstate passengers is forbidden by any provision of the Federal Constitution, the Interstate Commerce Act

or any other Act of Congress, so long as there is equality of treatment of those of different races. The question arises under the rule of the Railway whereby the space in its dining cars is divided: one portion for the exclusive use of Negro passengers and the remaining part for the exclusive use of white passengers. It is the operation of the rule of the Railway that gives rise to the question for decision; not the segregation statute of the State of Virginia in which state the incident here in question occurred."

SUMMARY OF ARGUMENT

It is respectfully submitted that the pertinent rules of the Southern Railway Company are in accordance with the Supreme law of the land as declared by the Supreme Court and the lower courts. Not only so, but those rules are wise, for the best interests of all the people affected, and in accord with the highest ethical standard.

The purpose of regulation is not utterly to prohibit. The Southern Railway Company, to all practical intents, operates only in that region where anything more than is required by the rules here under attack would render its attempt to operate its railway system absurd. To adopt the contention of Appellant would be the kiss of death and render operation of the railway impossible.

These rules apply to all and should be obeyed by every passenger.

In Holy Writ we read: "Wherefore if meat make my brother to offend I will eat no flesh while the world standeth, lest I make my brother to offend." 1 Corinthians 8:13. Why should not both white and colored passengers in interstate commerce be willing to rise to the height of that highest ethical standard? Why should any passenger be unwilling to give that much consideration to his fellow passengers?

The Constitution of the United States granted complete and exclusive power to regulate interstate commerce to "The Congress". In the exercise of that power the Congress has repeatedly refused to require more than the rules in question indicate.

ARGUMENT

Judge Coleman, in writing the opinion of the majority in the lower court in this case said:

> ". . . (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now

approved by us is based, when it said (269 I. C. C. 73, at page 76): 'Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future'. To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is any empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, every seat in the dining car may be occupied.

"For the reasons herein set forth the complaint must be dismissed." (R. 260.)

To the same effect is each of the six decisions cited and referred to in the Index to this brief and in the Simmons case it is said:

"It must be repeated and steadily borne in mind that the power to regulate inter-

state commerce is vested in Congress. This power Congress has, within certain limits, delegated to the Interstate Commerce Commission. To what limits the powers of this latter body extend need not be inquired into. The fact remains that neither Congress nor any agency created by it has sought to impose any regulation dealing with the separation of passengers in interstate commerce. The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt and that it considered that rules providing for the segregation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurp-

ing the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the exercise of power specifically and solely entrusted to it, has refused to lay down." *Simmons* v. *Atlantic Greyhound Corp.*, W. Dist., Virginia, decided December 30, 1947, 75 F. Supp. 166.

Fourteen times the House has voted against anti-segregation proposals.

The views taken by the Committee are amply borne out by speeches of Members of the House, as evidenced by their reproduction as Appendix A of this brief.

The briefs for the Interstate Commerce Commission and Southern Railway Company leave little to say. All pertinent cases, the Constitution, Statutes, history of this case, and the rules made by the railway have been cited and quoted. To prolong this argument would be but repetitious.

But in behalf of "The Congress" whose silence has been thunderous; whose Counsel in the instant case has abandoned its defense and espoused the alleged cause of its adversary; for "The Congress", to whom alone has been granted by the Constitution the power to regulate interstate travel; it must be said that the trust has been kept sacredly, and administered faithfully, for the best interests of all! "The Congress" confidently awaits the decision of this appeal, and the verdict of history!

CONCLUSION

I respectfully submit that this case should be affirmed.

Respectfully submitted.

SAM HOBBS,
Amicus Curiae.

I hereby certify that a copy of this brief has been served upon counsel for the appellant and upon the Solicitor General of the United States.

SAM HOBBS,
Amicus Curiae.

APPENDIX A

THE HENDERSON CASE

Mr. GOSSETT. Mr. Speaker, I hope I may be pardoned for name calling, seeming exaggeration, and dealing in generalities. But this is a short speech, and the provocation for making it is great.

A new, little publicized, and dangerous assault is being made upon the dignity, decency, and security of this Republic. The Department of Justice, together with the CIO, is going before the Supreme Court in the Henderson case and is asking the Court to overrule the well-established law of this country and to declare the "separate but equal" facilities doctrine to be unlawful. The Department of Justice is acting in opposition to the Interstate Commerce Commission. The Department of Justice is asking the Supreme Court for antisocial legislation by judicial fiat. If the Supreme Court holds with the Department of Justice, and against the Interstate Commerce Commission, we will have, in effect, outlawed all forms of segregation. Racial pride and purity are virtues, not vices. The position taken by the Department of Justice would eventually mongrelize and bastardize all races within this country to the degradation, shame, and destruction of all races. This assault is launched either through malice or ignorance. Those responsible are either villains or fools.

Could it be that the great Department of Justice is becoming a political adjunct of those who would pander to ignorance and prejudice in order to purchase votes at the sacrifice of principles?

In the first place, the Department of Justice has no business intervening in the Henderson case. In the second place, it is an insult to the Supreme Court to openly seek to wring from it social legislation instead of sound judicial decision. Let us hope the Court will live up to its honorable traditions and will not be a party to nefarious schemes that would undermine and destroy this Nation.

THE HENDERSON CASE

Mr. COLMER. Mr. Speaker, and Members of the House, I hope you will pardon me in this deviation from my usual conduct here with reference to the matter of making 1-minute speeches. I am provoked into this deviation by an editorial which appeared in the morning Washington Post attempting to justify the unusual and inconsistent conduct of the Department of Justice in interfering in the case now pending in the Supreme Court between a publicity-seeking Negro, on the one hand, and the Interstate Commerce Commission, on the other.

The decision of the Interstate Commerce Commission holding that the Southern Railroad did not violate its regulation in the Henderson case was upheld by a Federal district court requiring passengers to be segregated, but providing for equal accommodation in the railway's dining cars.

If I understand the duty of the Department of Justice, that duty requires that the Department of Justice enter a case, if it enters at all, on the side of the Interstate Commerce Commission and the Federal courts; but, substantiating the charge that the Justice Department has become the political arm of the administration's political philosophy, we find it injecting its strong arm into this case in an effort to have the highest Court of the land reverse itself and the law of the land in order to carry out the political philosophy of the administration in racial matters.

More than that, Mr. Speaker, we have here a spectacle of the Department of Justice attempting to persuade the Supreme Court, by judicial fiat, to decree what the Congress, the legislative body of the Government, has refused to legislate.

This is but another evidence of the bold and brazen effort of those now in charge of our Government to obtain by indirection what Congress has refused to do. For, if the Court yields to this political interference of the Department of Justice, and upholds its views, segregation in all forms, in our hotels, in our picture shows, in all public and private places, is at an end, another cherished right of the individual—choosing his own associates—is denied.

It is indeed alarming in this connection, Mr. Speaker, to note that the Department of Justice, which is supposedly charged with upholding our form of government, and opposing such modern isms as communism, sees fit to cite statements made by Soviet representatives, in support of the Russian effort to break down segregation in this

country, as it does on page 61 of its brief before the Court.

It is unthinkable, the Washington Post to the contrary notwithstanding, that the members of the Supreme Court, regardless of their own varying degrees of so-called liberality, will accede to this type of political propaganda. I rather believe that that body will adhere to the view that this Government is composed of three independent departments, and that legislation in social, as well as other human relations, is a matter entirely within the province of the Congress.

HENDERSON AGAINST INTERSTATE COMMERCE COMMISSION

Mr. BRYSON. Mr. Speaker, Members of the House, particularly those of the legal profession, will be especially interested in a case now pending before the United States Supreme Court entitled "Henderson Against Interstate Commerce Commission and Others," docketed as No. 25.

From a cursory reading of the pleadings, it readily appears that an intentional attempt is being made to bypass the Congress of the United States and have a judge-made law. It seems that there are those who have no hesitancy in deliberately violating the specific constitutional provisions establishing the three distinct branches of our Government.

No possible barrier to segregation in interstate travel can be found in our Constitution. Repeat-

edly the courts have held that separate but equal facilities in travel are all that may be required. The purpose of the pending case is to seek a judicial determination to the effect that only the same facilities will fully meet the issue. Surely the Court will never adopt the extreme views now sought to be established as the law of the land. Let it be remembered that the Congress itself, the only lawmaking agency in the Government, has consistently refused to adopt the radical, unreasonable view taken in the incident case.

Should this new doctrine on segregation be allowed, it might well follow that all efforts to preserve any separation of the races, including marriage, shall be thwarted. Surely those who continue to harangue, harass, and divide us know not what they do.

THE HENDERSON CASE

Mr. HERLONG. Mr. Speaker, seldom during this first session of the Eighty-first Congress have I risen to give voice to my feelings on matters of the public interest. Rather, I have felt that I could accomplish more and contribute just as much by listening and learning from those who have become grizzled and gray through years of experience and whose wisdom I recognize and respect. The action of the Department of Justice, representing the United States as codefendant in the Henderson case in not only declining to defend the case but actively participating in

an attempt to reverse the judgment of a specially constituted District Court in and for the District of Maryland, however, prompts me to add my voice to those of my distinguished colleagues who feel that such action is beyond the realm of precedent or reason. I have carefully read the brief filed by the Solicitor General, Mr. Perlman, on behalf of the United States, and as a Member of Congress I cannot but resent the attempt of the Justice Department to ask the highest court in our land to usurp legislative functions and write new law to take the place of the regularly enacted legislation of this Congress. This Congress has repeatedly, during this session, expressed itself on the question of segregation. One of the more notable instances was when an attempt was made to eliminate segregation in the housing bill. This proposal was overwhelmingly defeated. Other such attempts during this session have also been defeated.

I could discuss at great length the practical and humane arguments in favor of segregation in the Southland; and feel confident that with a fair opportunity to present evidence to people whose minds are not closed through fear of loss of political support, I could show the impracticability of handling this problem in the South at this time in a manner different than it is now handled. I could show through the testimony of many hundreds of Negroes themselves that they not only do not desire, but bitterly resent this interference by outsiders who have nothing but misinformation and outright misrepresentation and no personal knowledge whatsoever of the true conditions existing in the Southland. I could tell

you in detail how professional troublemakers come into the South, and on the pretext of securing information and writing eyewitness news stories, so grossly distort the real facts as to make them unrecognizable when they appear in print.

As an example of how these people operate and attempt to poison the minds of the people in the North against the South, there was a case in my home county recently in which three Negro boys were convicted of raping a young bride. An attempt was made in some of the northern papers to give the wrong impression of what actually happened by reporting that the defendants were convicted by an all-white jury. These subsidized specialists in scuttling the South did not say in their story that the prosecution on behalf of the State of Florida in that case went far beyond the requirements of the law in insuring to the defendants a fair trial. They did not say that there were Negroes on the jury panel in the same proportion as there were Negro registered voters, and most of them are registered voters and vote in that county; they did not say that when the name of a Negro juror was drawn he would be excused by the defense—not the prosecution but the defense—on a peremptory challenge on some frivolous ground, so that they would be able to say after the case was over that it was tried by an all-white jury; they did not say in the story that the State attorney excused, on peremptory challenges, several good white jurors in an attempt to get to Negro jurors, and found whenever he did get to them that the defense did not want them to serve.

After the trial was over and the three defendants were convicted, the jury recommended mercy for one of the defendants and he was sentenced to life imprisonment. The other two received no such recommendation. Even though the prosecution had tried all the cases together, the defense then claimed that the two who were convicted without recommendation of mercy did not receive a fair trial. But they agreed that the one who received a recommendation of mercy did receive a fair trial; these stories have not said that after the trial one of these defendants asked to talk with the officers and in a voluntary statement, which was recorded, stated, in effect, that he was more than pleased with the outcome of the case, that all of them were guilty, that he had told a false story at the trial because the defense attorneys had told him that his only chance of getting off would be to lie about the true facts; as a matter of fact, a greater effort was made on the part of the defense attorneys to inject a discrimination issue into the trial than there was to actually defend the case.

This practice of distorting the facts has been going on for years. This is not the first time that it has happened. But the people in the South have just listened and ignored them, choosing to consider the source from which they came. But when the Solicitor General's office injects itself in an effort to give strength and dignity to this type of activity, then it is no longer a trivial matter. It is time to let the people everywhere know the true facts.

But as important as the segregation question is, this Henderson case strikes even deeper than

that. Here is the result of an attempt, inspired and prompted by these same talented triflers with the truth, to persuade the Solicitor General's office to endorse the transfer of the legislative functions of the Congress over to the courts. The Congress has repeatedly spoken to the contrary. In the brief of the Solicitor General's Department they admit that even precedent in the courts is against their position, but they urge that the precedent, the decision in the case of Plessy against Ferguson, has been determined erroneously and that the doctrine of that case should now be reexamined and overruled. As you know, the customary procedure is that Congress enacts legislation. If it is not clear or there is any question about the intent of Congress, it goes to the courts for interpretation. If the interpretation follows the true intent of the Congress it remains the law of the land until changed by the Congress. If the interpretation goes afield from the intent of the Congress, further clarifying legislation is presented so that the real intent of the Congress is the law. Several times during this session we have been asked to vote on measures designed to correct a decision of the Supreme Court in order to insure that the true intent of Congress is actually the law. This precedent, which they desire now to have overruled, was decided in 1895. Since that time many Congresses have met and adjourned. It seems to me that if the Supreme Court had erroneously interpreted the intent of Congress, there has been ample opportunity in these 54 years to clearly set out the real intent by statutory law. The reason

it has not been done is simply because the decision was correct, the opinion of the Solicitor General to the contrary notwithstanding.

I hope this Congress will jealously guard its policy-making prerogative. Our legislative authority should not be usurped.

SEGREGATION

Mr. WILLIAMS. Mr. Speaker, I shall not use all of my time. I merely wish to add my thoughts to the remarks of the distinguished gentleman from Florida, who preceded me. To do justice to the subject would take hours.

Mr. Speaker, I have always understood that our Government was composed of three branches, with certain specific powers delegated to each by the Constitution. It has been my belief that the duty of the legislative branch was to enact and repeal laws, and the duty of the judicial branch to review and pass upon the constitutionality of legislation enacted by the legislative branch.

This belief, apparently, is not held by the Justice Department. For it is today asking the Supreme Court to assume legislative powers and authority not granted to it under the Constitution.

The Justice Department, in the so-called Henderson case, is asking the Supreme Court to legislate judicially that which the House and the Senate have consistently refused to act upon.

The Justice Department has asked the Supreme Court to set aside its age-old, tried and true, "separate but equal" theory in regard to racial segregation in favor of complete abolition of segregation.

I have always understood it to be the duty of the Justice Department to defend the orders of the Interstate Commerce Commission—the defendant in this case—as well as to represent other agencies of Government in matters of litigation.

In complete disregard of its duties, the Justice Department has organized its legal facilities in a fight against a companion agency in the Government, rather than defend it. They seem to have contracted the same "minority" disease that has swept the world ever since Russian communism became a world philosophy, and Russia became a world power. The Justice Department has completely surrendered to the Communists, the radicals, the fellow travelers, the pinks, and the punks.

Who are those who stand behind the Justice Department in this suit? Are they the great mass of the American people? Or are they blocs of selfish interest groups intent upon forcing their will upon the American people, whether they like it or not?

Briefs have been filed in this case on the side of the appellant by the CIO—which hopes to use the Negro as a club with which to whip the American people into submission; the National Association for the Advancement of Colored People—a radical organization which for years has directed its activities toward stirring up racial strife in the North as well as the South; the AVC—an off-brand pink and Communist flavored alleged veterans' organization which has caused nothing but trouble since it was organized; and the National Lawyers' Guild—another red outfit.

There is no demand from the Negroes of the South for this kind of ruling—that is evident.

Yet we know that these Communist organizations always point to the southern Negro as the one who is suffering from segregation. There is no doubt about the part that politics is playing in this suit, and I hope that the Court will not allow itself to be degraded to the level on which the Justice Department seeks to place it. There is no demand from the American Bar Association for the outlawing of segregation; there is no demand from the bona fide, reputable veterans' organizations for such a ruling. There is no demand from Congress—it has had the opportunity for years to outlaw segregation legally and constitutionally. There is no demand in the Constitution of the United States for the abolition of segregation.

The Justice Department knows this—they also cannot be blind to the disastrous effects upon our Nation that would occur from the abolition of segregation. Yet they are willing to barter the peace, good will, and welfare of our people for the miserable political advantage which might accrue from their action.

Listen to this, taken from the brief of the Justice Department in this case:

> What we seek is not justice under law as it is.
>
> What we seek is justice to which law, in its making, should conform.

Where is the authority of the Supreme Court to interpret the law—not on the basis of what it is, or what is intended to be—but rather to draw from the law what is not in it, and make it conform to what they think should be in it?

The present law on the subject of segregation can be changed under the Constitution only by

Congress, or the people. The Supreme Court cannot make laws, or change laws—the Justice Department should know that.

A reading of the brief filed by the Justice Department in this case will show that the authorities cited therein are not legal authorities, but are from propaganda leaflets, lay commercial publications—and, particularly Russian and Communist books and periodicals. The kind of brief filed by the Justice Department in this case would insult the intelligence of any backwoods justice of the peace. The Supreme Court should resent this assault upon their integrity, ability, and intelligence.

Here are a few, but typical, of the authorities cited by the Justice Department in support of their fantastic contentions:

First. Native Son, a fictional novel by Richard Wright, a Chicago Negro.

Second. Caste and Class in a Southern Town—another lay article, making a prejudiced, biased attack upon the decent and God-fearing people of the South.

Third. The Negro Ghetto, by Weaver, enough said.

Fourth. Negroes in Brazil, by Pearson.

Fifth. Can the Negro Hold His Job?—from a bulletin of the NAACP, one of the uninvited meddling participants in this case.

Sixth. The Bolshevik.

Seventh. Nationalism—Tool of Imperialist Reaction, written in Russia by a Communist writer named Frantsov.

Eighth. The Soviet Representative to the United Nations, who is cited many times throughout the brief.

Ninth. The Literary Gazette, an official publication of the United States of Soviet Russia.

Tenth. An American Dilemma, by Myrdal, and so forth and so on.

In filing this brief, the Justice Department has sunk to the lowest levels in history. They are being cajoled into a violation of their oaths by monstrous groups intent upon destroying our Democratic form of government, our people and our Nation.

The Constitution of the United States very carefully avoided any reference to segregation. In the fourteenth amendment, giving the Negroes equal rights with whites, there is no mention of segregation, and it cannot be inferred that it was intended that segregation should be abolished. We know that granting equal facilities and equal opportunities to Negroes is right and necessary in order to meet the requirements of democracy. But must we amalgamate our people in order to meet those needs? To allow such a thing to happen would be to betray our country and its glorious history. We cannot allow these power seekers to mongrelize our people through a forced amalgamation of the races. To do that would bring on national suicide, as it did for Greece, for Rome, for Egypt, and for all of the other great empires of the past.

Why was mention of segregation not made in the Constitution? Listen to the words of Thomas Jefferson:

> Nothing is more certainly written in the book of fate than that these people—

Meaning the Negroes—

> are to be free; or is it less certain that the two races, equally free, cannot live in the same government.

Perhaps Jefferson went further along those lines than we should go today. But he did reflect the thinking of the writers of our Constitution, who recognized the incontrovertible fact that a mongrel America cannot live in peace; nor can a mongrel America hold the respect of the world.

Abraham Lincoln, champion of the Negro, admitted—and I quote:

> A separation of the races is the only perfect preventive of amalgamation; but as an immediate separation is impossible, then the next best thing is to keep them apart where they are not already together.

Segregation is admittedly the only solution to the Negro problem, if such a problem exists. This Congress can pass laws from now until doomsday, and the Supreme Court can render limitless decisions outlawing segregation, and attempting to force upon both white and black an integral society. But until such time as people of both races are willing to intermingle socially, these laws and decrees could and would be of no value whatsoever. On the other hand, they could result only in bloodshed and strife.

Do the Negroes want to intermingle socially with the whites? Certainly not in my section of the country. If they did, then, of course, there would be no Harlem in New York, and no South Side in Chicago. Joe Louis would not be opening his exclusive colored restaurant in Detroit next week.

It was a Negro—the greatest of them all—who uttered the philosophy which has been followed by our courts, our Congress, and our people down through the years. The words of Booker T. Washington will live as long as civilization itself:

> In all things which are purely social, we can be as separate as the fingers; yet one as the hand in all things essential to mutual progress.

Segregation has obtained in this country for so long a time that it has become an established tradition or institution. It has been approved, not only by the people who established it, but by the courts and the Congress. Suddenly, the highest tribunal in the land is called upon to sweep away the bulwark existing in our social and political orbit. They are being asked to deny to our people the fundamental constitutional right of a continuation of this established, approved, and successful practice.

America has grown great and all powerful under our time-honored social and political system. There is a reason for this: The people have an inherent right to shape their own respective destinies. The architects of our dual system of constitutional government purposefully retained in the people themselves, through their duly elected representatives, the right to legislate laws, repeal laws, and inaugurate policies for the general welfare of all the people. Nowhere can that right and authority be found except in the legislative—and not the judicial—branch of our Government.

The philosophy and practice of segregation had its origin in the teachings of the Apostle Paul, in his ministry to the Jews, Greeks, gentiles, Romans, and all peoples everywhere. His doctrine is found recorded in the seventeenth chapter of Acts, twenty-sixth verse:

> And hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation.

I am confident that the Supreme Court will promptly affirm the decision of the lower court. To do otherwise, would be to encroach upon the rights granted to Congress under the Constitution of the United States.

THE HENDERSON CASE

Mr. DAVIS of Georgia. Mr. Speaker, I have noted with interest the remarks made in recent days on the floor of the House by Messrs. Gossett, of Texas; Colmer, of Mississippi; Herlong, of Florida; and Williams, of Mississippi, calling attention to a brief filed by the Solicitor General of the United States in the case of Henderson against the Interstate Commerce Commission et al., pending in the Supreme Court of the United States.

There is nothing unusual about the case in itself. It does not present a new issue. It is one of many cases in which attacks in the past have been made in the courts upon segregation laws—an effort to have the courts substitute for existing law a new provision which is not law, and which

cannot become law under our system of government, unless appropriate and constitutional action is taken by the legislative department of our Government, upon whom the responsibility rests to make legislative changes; namely, the Congress of the United States.

The courts have consistently refused to assume lawmaking powers in connection with this question.

The circumstance connected with the filing of this brief which is unusual is the fact that the Solicitor General of the United States has permitted radical minority pressure groups to use him and the prestige of his office in their conniving efforts to pressure the United States Supreme Court into changing the law.

Briefly stated this case originated when the plaintiff, a field representative of the so-called Fair Employment Practices Commission, petitioned the Interstate Commerce Commission to require a railroad to completely eliminate segregation of white and colored passengers in its dining car.

The Interstate Commerce Commission dismissed the complaint. A three-judge district court held that the existing regulations were prejudicial, in that certain tables were only conditionally reserved for colored passengers, whereas all other tables in the car were unconditionally reserved for white passengers. The case then was remanded for further proceedings not in conflict with that ruling.

Pursuant to that ruling the regulations were changed to provide for tables to be reserved un-

conditionally for colored passengers just as tables were reserved unconditionally for white passengers. The seats unconditionally reserved for colored were almost twice the percentage of colored travel on the railroad as compared with the proportionate percentage reserved for white passengers.

That regulation was upheld by the Interstate Commerce Commission and by the district court of the United States, and was appealed by the plaintiff to the Supreme Court.

The law in question is established law, recognized, followed, and complied with for many years. It was applied to the instant case and upheld by the proper agency of the Government, the Interstate Commerce Commission, whose ruling was confirmed by the district court of the United States.

The action of the Solicitor General in this case is nothing more nor less than an attempt to aid the plaintiff in this case in trying to overturn the present established law, and to substitute therefor as law a new and radical doctrine, through the process of judicial legislation.

Contrary to the position and to the action of the defendant, the Interstate Commerce Commission, this brief undertakes to confess judgment in the case, and to aid the efforts of the plaintiff and the radical groups associated with him in an effort to nullify the functions of Congress and to secure a change in long-established law by judicial legislation.

The Solicitor General, with no authority to do so, undertakes to announce the policy of the United States by stating:

> Since the United States is of the view, however, that the order of the Interstate Commerce Commission is invalid, this brief sets forth the grounds upon which it is submitted that the judgment of the district court is erroneous and should be reversed.

The Solicitor General does not have the authority to frame or to announce the policy of the United States with reference to legislative matters. These functions are performed by the legislative department of the Government; namely, the Congress. In another portion of the brief the effort is made to have the Supreme Court discard existing law, a function which clearly does not belong either to the executive or judicial department, but is a function and responsibility to be exercised, if at all, by the legislative department, the Congress. The portion referred to is as follows:

> If this Court should conclude that the issues presented by this case cannot be considered without reference to the "separate but equal" doctrine, the Government respectfully urges that, in the half century which has elapsed since it was first promulgated, the legal and factual assumptions upon which that doctrine rests have been undermined and refuted. The "separate but equal" doctrine should now be overruled and discarded.

That is what I would consider a brazen request. The Congress of the United States is now in session. There are bills pending before Congress

involving the precise question in this case; namely, abolition of segregation. The Congress is the proper arm of Government to enact such legislation, or to refuse to enact it. The Congress has during this present session, on more than one occasion, specifically refused to change the segregation laws, and it is nothing less than brazen effrontery for the Solicitor General to ask the judicial department of the Government to overrule and discard the law which now exists, which Congress has refused to do.

The so-called brief, in its list of citations, contains almost 2 pages of references to such things as Black Metropolis, by Drake and Caton; Psychodynamic Factors in Racial Relations, by McLean; Negroes in Brazil, by Pearson; and Color, Class, and Personality, by Southerland, to support the radical position adopted. The effort of the Solicitor General and his two assistants to speak for the United States, and the Government, in this matter reminds me of the three tailors of Tooley Street who called themselves, "We, the people of England—."

Others joining in this outrageous attempt to high pressure the Supreme Court, and to bypass Congress, in the effort to secure "judicial legislation," are the radical, discredited National Association for the Advancement of Colored People, the American Veterans Committee, equally as radical and equally as much a stench in the nostrils of good Americans, and the CIO, some of whose racketeer leaders have violently resisted all efforts of the Congress and the American people to force that organization to

purge itself of admitted and acknowledged communistic members and influence. All three of these groups—the NAACP, the AVC, and the CIO—are ardent advocates of that unconstitutional, radical monstrosity known as the FEPC bill.

The Congress has steadfastly declined to pass that bill, although these radical groups have clamored loudly and insistently for it. Many States of the Union have likewise refused to pass it. If this conniving conspiracy, aided and abetted by the Solicitor General, should be able to secure this piece of "judicial legislation" which they seek to do in the case under consideration, it is not improbable that they would work out some scheme to carry another case to the Supreme Court and ask that branch of the Government to enact an FEPC law.

If the Supreme Court can discard segregation law, which the Congress itself has refused to do, it can also discard the constitutional safeguards which protect us from such radical monstrosities as the FEPC bills.

I hope that the Supreme Court of the United States will recognize this maneuver for what it is, and that that body will stay within its appropriate sphere with reference to this law and all other laws.

I recently quoted in a speech a statement made by Donald R. Richberg, in an address he made on July 29, 1949, to the Virginia State Bar Association at its annual meeting. I would like to repeat that quotation here. It is:

> As an active practitioner, and a prospective teacher, of constitutional law, I

must make a clear distinction between what the law is and what the law ought to be. The Supreme Court is the final arbiter or what the law is. But the people are the final arbiters of what the law ought to be and eventually shall be. If they believe that the National Government should have and exercise greater powers to promote the general welfare, they will find the way to enlarge its authority. If they believe that more local self-government is essential to their liberties and their pursuit of happiness, they will find the way to enlarge the authority of the States and the municipalities.

So long as the three departments of our Government, namely, the legislative, the executive, and the judicial, remain separate and independent, and each performs those and only those duties which devolve upon it, our Government can withstand all assaults which may be made upon it, whether from without or from within.

This is what protects us from dictatorship. This is what preserves our Government as a Government of laws and not a Government of men.

This is our system of checks and balances under which one department of Government may be restrained by the other two departments from assuming powers which do not belong to it. Time has demonstrated that the maintenance of this separate and independent status is necessary.

Any effort on the part of any one of these departments to usurp or exercise functions properly belonging to another should be promptly and effectively squelched.

It is true that there is abroad in the world today a school of thought which has attracted to itself some support in certain quarters that new laws must be devised upon every subject—that there is no wisdom or virtue in laws already in existence. This impatient school of thought must have immediate change in everything, and if Congress refuses to jump when the spur is applied, then other and quicker means must be devised to bring about the desired change.

It is to protest against such attempted action that I am making these remarks today. I would call to the attention of the House this little verse written many years ago:

> In vain we call old notions fudge
> And shape our conscience to our dealing.
> The Ten Commandments will not budge,
> And stealing will continue stealing.

There are certain fundamentals which are not affected by the passage of time. One of these is that the Supreme Court of the United States cannot discard valid existing laws. Any request by any person that the Supreme Court perform such an act is outrageous, should not be viewed with equanimity, and should not be countenanced either by the people, by the Congress, or by the Supreme Court.

There is a widespread demand throughout the country now for economy in the operation of the United States Government. Much complaint has been made that the Government has far too many people upon its various pay rolls, and that it is possible to prune these pay rolls and reduce appropriations, which in turn will result in re-

duced taxes. If the office of the Solicitor General is now staffed to the point where the Solicitor General and two of his subordinates can take time to read and digest the number of books about psychology, psychodynamic factors in racial relations, Negroes in Brazil, and enough more to fill up almost 2 pages of citations, and cite these books and writings as authority in a supposed brief of law, then I think it is high time for the Appropriations Committee and the Congress to see if that is not one place where some pruning may be done with good effect to that department, to the taxpayers, and to all concerned.

APPENDIX B

CONSTITUTION

Article I, Section 8. "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;".

APPENDIX C

(R. 7–8, 223, 252)

WASHINGTON, D. C., *February 19, 1946.*

Transportation Department Circular No. 142.

Cancelling Instructions on this Subject Dated July 3, 1941, and August 6, 1942.

SUBJECT: SEGREGATION OF WHITE AND COLORED PASSENGERS IN DINING CARS.

To: Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of

the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserve" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946.

APPENDIX D

49 U. S. C. Sec. 3, par. 1

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 25

ELMER W. HENDERSON,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILROAD COMPANY,
Appellees.

On Appeal from the United States District Court for the District of Maryland.

BRIEF AMICUS CURIAE ON BEHALF OF THE CIVIL RIGHTS COMMITTEE OF THE NATIONAL BAR ASSOCIATION.

JOSEPH R. BOOKER, President, National Bar Association
RICHARD E. WESTBROOKS, Chairman, Civil Rights Committee, National Bar Association
GEORGE N. LEIGHTON
ZEDRICK T. BRADEN
LUCIA T. THOMAS
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II. Under the exclusive power granted it by the Constitution of the United States, Congress has provided a broad and comprehensive plan for the regulation of interstate commerce by enacting the law known as the Interstate Commerce Act. This Act, as amended, precludes any state, public utility, person or body of persons from adding to, taking away from, limiting the scope of or restricting or interfering with the exercise of congressional power over interstate commerce. 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

ELMER W. HENDERSON, Appellant, vs. THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILROAD COMPANY, Appellees.	On Appeal from the United States District Court for the District of Maryland.

BRIEF AMICUS CURIAE ON BEHALF OF THE CIVIL RIGHTS COMMITTEE OF THE NATIONAL BAR ASSOCIATION.

Now comes The National Bar Association, Inc., by Joseph R. Booker, president; Lucia T. Thomas, assistant secretary; Richard E. Westbrooks, chairman of the Civil Rights Committee of The National Bar Association; George N. Leighton; William A. Booker, Zedrick T. Braden, Georgia Jones Ellis, Earl B. Dickerson, and Joseph E. Clayton, Jr. as counsel for and members of said Civil Rights Committee of the aforesaid organization, for and on behalf of themselves and more than 3000 other lawyers, who are American CITIZENS of color, and having first obtained the consent of all parties of record to this cause, files this, its Brief *Amicus Curiae* as provided by the rules of this court as amended.

The National Bar Association has among its members, American Citizens of color who must utilize all

facilities of Railroads and Common carriers in the pursuit of their professions as members of the bar of all States and federal courts. Said railroads and the common carriers are subject to the jurisdiction of the Interstate Commerce Commission when that commission exercises the powers vested in it by the provisions of Title 49, U. S. C.

In our view the fundamental question presented on appeal by the appellant in this case affects the rights of every member of the National Bar Association. The interests of The National Bar Association and its members stem from the affect on the rights of these members of the rulings in the case at bar by the tribunals below. As American Citizens of color, the members of The National Bar Association share the conviction that the questions presented for review by this court will be more adequately considered if the brief *amicus curiae* be supported by argument and authorities which have been obtained by research of its Civil Rights Committee.

Further, the members of The National Bar Association respectfully call the attention of this Honorable Court to the fact that in addition to the rights of the members of the National Bar Association, and the appellant herein, the question presented on review touches the basic rights of more than 15,000,000 American citizens of color.

QUESTIONS PRESENTED.

We adopt the statements of the Questions Presented as they appear in the Briefs of the appellant and of the United States.

STATEMENT.

We adopt the Statement of the case as contained in the Briefs of the appellant and the United States Government.

SUMMARY OF ARGUMENT.

ARGUMENT.

POINT I.

The Dining Car Regulations adopted by the Southern Railway Company are void because their effect was to engraft on the Interstate Commerce Act a provision which the Congress of the United States has no power to enact or adopt.

As *amicus curiae,* we are constrained at the outset to emphasize the pervasive effect of the Dining Car Regulations of March 1, 1946, which were adopted by the Southern Railway. With commendable candor the railroad company admits that these regulations are designed to furnish the basis for a race segratory system by which American citizens who are passengers in interstate travel would be furnished accommodations in accordance with their race or color. The ultimate result of these regulations is racial segregation of all American citizens whenever they embark on interstate travel.

The particular statute that protects American citizens from discriminatory practices in interstate travel is paragraph 1 of sec. 3 of the Interstate Commerce Act. In *Mitchell* v. *United States,* 313 U. S., 80, this court construed this section ot the Interstate Commerce Act and held that it prohibited the denial of railroad facilities to an American citizen solely upon the fact that he is a Negro. In that case the passenger, purchased a round-trip ticket from Chicago, Illinois to Hot Springs, Arkansas. In Memphis, Tennessee the passenger tendered payment for a Pullman seat from Memphis to Hot Springs, Arkansas. The train conductor took up the Memphis-Hot

Springs, Arkansas portion of the ticket but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled the colored passenger to move into the car provided for colored passengers. As in the case at bar, the accommodations which the railroad company in that case contended it had the right to give the passenger were allocated pursuant to a system by which passengers in interstate travel were sold accommodations in accordance with their race and color. Mr. Chief Justice Hughes, in condemning the treatment of this American citizen of color as being unjust said:

> "The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against State action by the 14th Amendment (*McCabe* v. *Atchinson, T. & S. F. Ry.*, 235 U. S., 151, 160-162; *Missouri ex rel Gaines* v. *Canada*, 305 U. S., 337, 344, 345) and in view of the nature of the right and of our Constitutional policies it can not be maintained that the discrimination as it was alleged was not essentially unjust."

Even a cursory reading of the Dining Car Regulations adopted by the Southern Railway Company (See appendix, brief for the United States) reveals without doubt that the appellee railroad company intends to treat all American citizens who come upon its trains in interstate commerce as was the appellant in the *Mitchell* case. Under these regulations an American citizen who tenders the proper fare for dining car service and who otherwise would be entitled to such service would be denied facilities because of his race or color. It is exactly this treatment that this court has said is "essentially unjust." *Mitchell* v. *United States, supra.*

This being so, we respectfully submit that the Dining Car Regulations adopted by the Southern Railroad ef-

fectuates a result which even the Congress of the United States is without power to create. We contend that if all the provisions of these Dining Car Regulations were carefully incorporated into a statute adopted by the Congress of the United States such a statute would contravene the limits of Congressional power defined in the 5th amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States, in the third clause thereof, provides that no person shall "be deprived of life, liberty, or property without due process of law". This clause has been construed to prohibit the adoption by the Congress of the United States of any statute that will be discriminatory or arbitrary in character. Therefore, we contend, that if the Dining Car Regulations adopted by the Southern Railroad Company were enacted into law by Congress, such a statute would be so arbitrary and injurious in character as to violate the provisions of this clause of the Fifth Amendment to the Constitution of the United States. *U. S.* v. *Petrillo*, D. C. Ill., 1946, 68 F. Supp. 845.

It is the admitted objective of the appellee railroad company to provide a system under which American citizens in interstate travel would be given railroad services depending upon their race or color. Again we say, if these regulations were incorporated into law, such a law would have the same objectives. In other words, of American citizens similarly situated in interstate travel, one group, being Negroes because of their color, would be sold dining car services under one circumstance, and the other group, being white, also because of their color would be sold different accommodations. These regulations in effect deny to American citizens in interstate travel equality of dining car facilities because of their race. If these regulations were enacted into law

such a statute would result in railroad services being sold to one group of American citizens while it be denied to another. This result, The United States Court of Appeals for the District of Columbia said in *Pike* v. *Walker*, 121 F. 2d, 37 could not be done by the Congress of the United States in the exercise of its power over postal services. In that case the appellant appealed from an order dismissing his complaint to restrain and enjoin the Postmaster General of the United States from enforcing a fraud order issued against the appellant. The court said:

> "It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be nonmailable, but we think it is equally clear, and is so stated in the *Coyne* case, that even Congress is without power to extend the benefits of the postal services to one class of persons and deny them to another of the same class."

The authority of the Interstate Commerce Commission and of the railroad to designate the treatment and the services to be accorded passengers in interstate travel has its sanction in the exclusive jurisdiction of Congress over the transmission of persons or property from state to state. *Railroad Co.* v. *Illinois*, 118 U. S. 557. But such power of designation and exclusion must be consistent with the rights of the people as reserved by the constitution. *Pike* v. *Walker*, *supra*.

We attach great interest to the fact that the exercise of this power affects more than the appellant in this case; the system instituted by the appellee railroad by its Dining Car Regulations will touch and affect the rights of every American citizen who needs the services sold by this railroad and others that follow its policies. The Dining Car Regulations, approved by the Interstate Commerce Com-

mission in its order below, become a part of the laws of the United States in the exercise of its power over interstate commerce. We submit, that this is an instance in which the exercise of power over an area in which Congress has exclusive jurisdiction has been effected inconsistent with the rights of the people.

By apt analogy we find support in the case of *Esquire* v. *Walker*, 151 F (2d) 49. There, the plaintiff filed an action to enjoin the enforcement of a decision of the Postmaster General revoking its second-class mailing privileges. The court in reversing an order denying the injunction used language which appears to us appropriate to this occasion:

> "But mail is not a special privilege. It is a highway over which all business must travel. The rates charged on this highway must not discriminate between competing businesses of the same kind. If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good the exercise of that power would be clearly unconstitutional. • • •"

It is our contention that the order of the Interstate Commerce Commission in this case had the effect of an affirmative act of the Commission adopting the regulations. Cf. *Rochester Telephone* v. *United States, et al* 307 U. S. 125. And we submit that the act of the Commission is an act of the Congress of the United States since the Commission is the administrative agency to which regulation of interstate commerce has been delegated. In approving these Dining Car Regulations the Commission effectively abetted the creation of a discriminatory system by which railroad services are sold an American citizen in accordance with his race or color American citizens under such system will be denied full return in the moneys they pay for interstate travel service.

We note with approval that the Government of the United States in its Brief has cited numerous standard authorities dealing with the sociological effects of race discrimination and segregation. We adopt these authoritative citations and join in the request of the Government that this court reexamine and reconsider the doctrine of "separate but equal accommodations." We earnestly submit to this court that the oft cited principle which presumes public accommodations can be separate but equal is a theory devised in other days to avoid imagined unpleasantries in American race relations. Social studies by both foreign and American social scientists have established the fact that separate accommodations in public places are never equal. And we contend that equality in such instances is a physical impossibility. If the motive for urging separation of the races in public places is examined carefully, it will be seen that the opposite of equality is the objective sought by such practices. Equality that must be separate will destroy the inequality which is presumed by those who insist on separating the races in public accommodations. If such could be imagined, two Waldorf Astorias on opposite sides of the street would not only be physical impossibilities, but their existence would offend those who desire to exclude members of certain American minorities from the elegance now dispensed at the one we know exists. Segregation of the races in public places is one of the great evils which have been imposed on the American people from an era now outdistanced by our democratic instincts. Segregation, we submit, is by its very nature discrimination. For an agency of the American Government to adopt by approval a system of race segregation having these results in interstate travel is to deny to this appellant in particular, and to the American people in general, a basic right reserved in the people:

the right to equality of treatment by the Government, the right to be free from a governmental act that is arbitrary and injurious in character. *United States* v. *Petrillo, supra.*

II.

Under the exclusive power granted it by the Constitution of the United States, Congress has provided a broad and comprehensive plan for the regulation of interstate commerce by enacting the law known as the Interstate Commerce Act. This Act, as amended, precludes any state, public utility, person or body of persons from adding to, taking away from, limiting the scope of or restricting or interfering with the exercise of congressional power over interstate commerce.

By enacting the Interstate Commerce Act in 1887 the Congress of the United States declared the national policy with regard to treatment of American citizens in interstate travel or shipments. Title 49, U. S. C. We respectfully submit, therefore, that in addition to the reasons stated in the briefs for the appellant, and for the United States, we urge the following to demonstrate that the Dining Car Regulations of March 1, 1946 adopted by the Southern Railway Company are void:

1. Under the authority granted by the Constitution, the Congress of the United States in 1887 promulgated a full, comprehensive and uniform plan for the regulation of interstate commerce. The exclusive power of Congress over interstate commerce can be added, detracted or abrogated only by Congress.

2. Under the exclusive jurisdiction of Congress over interstate commerce, neither the states nor bodies of persons have power to impose restrictions upon the transmission of persons or property from state to state.

3. Under the authority delegated to a common carrier by the Interstate Commerce Act to adopt just and reasonable rules and regulations, the Southern Railway Company does not have power to adopt the Dining Car Regulations of March 1, 1946 because they contravene and violate the provisions of Section 3(1) of the Act.

This court has had occasion to rule on the principle we urge in the case at bar. In *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet. 535, 617; 10 L. Ed. 1060, 1090, speaking through Mr. Justice Story, this court struck down a Pennsylvania statute by which the state attempted to regulate fugitive slaves—a matter within the exclusive jurisdiction of Congress. The court said, 10 Pet. 535 at 617, 618:

> "In a general sense, this act may be truly said to cover the whole ground of the Constitution, both as to fugitives from justice, and fugitive slaves; that is, it covers both the subjects in its enactments; not because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the Constitution; but because it points out fully all the modes of attaining those objects, which Congress in their discretion, have as yet deemed expedient or proper to meet the exigencies of the Constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all State legislation upon the same subject; and by necessary *implication prohibit* it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it (618) cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the

same purpose. In such case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as to the direct provisions made by it. This doctrine was fully recognized by this court in the case of *Houston* v. *Moore,* 5 Wheat. Rep. 1, 21, 22, (5 L. Ed. 19) where it was expressly held that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

As was stated by Mr. Justice Story, when Congress enacts laws concerning a subject over which it has exclusive power, it was not intended by the Constitution that the states, corporate public utilities, persons or body of persons shall have power to interfere with Congressional jurisdiction. Governmental or quasi-governmental action in the same matter is void because it is presumed that if additional rules, regulations or laws materially affecting the subject were necessary, Congress would expressly delegate that power to subsidiary bodies to exercise. Therefore, when the Southern Railway Company and the Interstate Commerce Commission argue in the instant case that Congress has not expressly prohibited race segregation of American citizens in interstate travel, the obvious answer is because it has not expressly authorized such practice, any rule or regulation of a common carrier having such profound effect on the rights of American citizens is void because it invades important spheres of Congressional jurisdiction.

But we do not concede that Congress has failed to expressly prohibit race segregation in interstate travel.

We contend that the language of Section 3 (1) of the Act does condemn race segregation when it explicitly provides:

> "That it shall be unlawful for any common carrier subject to the Act to subject *any particular person* * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. 49 U. S. C. 3" *Mitchell* v. *United States,* 313 U. S. 80, at 93.

We do not believe that strained construction of this provision is necessary to show that the plain intent of Congress was to prevent just the form of discrimination that appellant complains of in the case at bar. Where the discrimination—the difference of treatment of persons similarly situated—is based on race distinctions, it is to be particularly considered repugnant to the mandate of Congress as expressed in Section 3 (1) of the Act. We respectfully submit that the power of Congress over interstate travel cannot be infringed upon by the rule or regulation of a common carrier in the manner attempted here.

The late and revered Mr. Justice Stone stated well the principle we think controls the instant case. He said in *United States* v. *Darby,* 312 U. S. 114 at 115:

> "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution'. *Gibbons* v. *Ogden, Supra,* 196 (9 Wheat. 1, 196.) That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentuck Whip and Collar Co.* v. *Illinois Central R. Co., Supra.* (299 U. S. 334). Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the state for which they are destined it may

conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use." (Citing cases)

The exclusive power of Congress to regulate interstate commerce has never been doubted. Since the decision in *Gibbons* v. *Ogden,* 9 Wheat., 196, rendered by Chief Justice Marshall it has been the law, supported by a long unbroken line of decisions. When Congress has spoken by enacting a law governing subjects which admit of national uniform application, the states, for example, have no power to alter, amend, limit, restrict, extend, or in any manner place a burden upon interstate commerce by any law, rule or regulation. If Congress had desired to supplement the Interstate Commerce Act with any rule providing for race segregation of certain American citizens, it would no doubt have so declared. By its specific prohibition against discrimination, Congress declared that it was unlawful to subject "* * * any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U.S.C. 3. We contend that any discrimination based upon an arbitrary racial classification of American citizens is undue or unreasonable prejudice or disadvantage in respect to those citizens.

Many decisions have been given by this Honorable court striking down laws, rules and regulations by whatever name they might have been called when the sum total amounted to discrimination in interstate commerce. Unjust discrimination by a common carrier has been defined "as a failure to treat all alike under substantially similar conditions". *Kentucky Traction and Terminal Co.* v. *Murray,* 195 S.W. 1119, 1120, 76 Ky. 59. We do not believe it can be seriously contended that it is not unjust discrimination to permit first class passengers of

the white race to enjoy dining car facilities without restrictions, and yet compel American citizens of color because of their race to be partitioned in little spaces separated from all other persons who had paid the same fare, and refuse them unrestricted service under similar conditions. By the Dining Car Regulations which the Commerce Commission has approved, all other persons, except the American citizens of color, are allowed the range of the dining car, allowed to select seats most comfortable to them. White passengers are not compelled to sit apart from other passengers, be shut off, cooped and enclosed with one table for service, or be refused service in the more spacious parts of the diner. It is admitted that American citizens of color were permitted the equal facilities of the dining cars without restrictions when they traveled as members of the armed forces and that they were not subjected to the humiliation of being segregated in a certain particular place and treated differently from all other American citizens similarly situated. (See: *Henderson* v. *Interstate Commerce Commission*, 80 Fed. Supp. 32.) Is it not time that America sustain the rights, privileges and immunities of its American citizens of color and that courts speak their denunciation of discrimination, segregation and denial of equal rights and privileges to this segment of the nation? Is it not time that we be consistent with our preachments to the world concerning equal treatment and opportunity to all mankind? Can America continue to be inconsistent when it preaches one doctrine to the world and practices another at home? We submit, it is time to be fair with ourselves and our fellow man and to make a realism "the brotherhood of man and the fatherhood of God."

"Discrimination" has again been held synonymous with "distinction". It is the antithesis of fairness. In

Atlantic Pipeline Co. v. *Brown County*, D. C. Tex. 12 Fed. Supp. 642, 647, it is stated:

> "Transportation in interstate commerce should be uniform and in accordance with contract made, fare charged and paid by each passenger."

As the white passenger pays a first class fare and is permitted the dining car facilities without restriction as to where he should sit then the American citizens of color who pay the same fare under the same contract should be given the same privilege. And if he be denied this, his rights are violated under the Interstate Commerce Act as an "unjust discrimination." He is treated differently from all other first class passengers. *Wimberly* v. *Georgia Southern and F. R. Co.*, 63 S. E. 2931; 5 Ga. App. 263. We do not believe that from the evidence in this case it can be honestly said there was no difference in treatment of the dining car facilities different from the treatment of all other persons. This violates the Interstate Commerce Act when the journey is in interstate commerce.

It is again stated that "unjust discrimination" results from different treatment of persons of the same class under similar conditions. *Lindenburg* v. *American Express Co.*, 106 So. E. 884; 88 W. Va. 439; *Elks Hotel Co.* v. *United Fuel Gas Co.*, 83 S. E. 922, 924; 73 W. Va. 200. We believe it will be conceded that when two persons pay the same fare they become members of the same class under similar conditions, and distinctions based solely on the color of one of the passengers result in unjust discrimination. Differences of treatment based solely upon race, color, or national origin are unjust, unreasonable and discriminatory.

It has been said that undue and unjust discrimination or unreasonable advantage or preference by a public service corporation under the Interstate Commerce Com-

mission Act *or at common law,* result from allowing to one person what is denied to another under exactly the same circumstances and conditions. 3 Moore on Carriers, 1705. To allow every other first class passenger traveling in interstate commerce the privilege of full dining car facilities and to deny the same privilege to an American citizen of color traveling under similar conditions cannot reasonably be deemed other than discriminatory. Segregation, solely on account of race, color or national origin in interstate commerce, is discrimination of the worst sort. These are the results where public utilities attempt to change the Interstate Commerce Act, without authority of law solely for the purpose of appeasing intolerance, hatred, prejudice, undemocratic and un-American customs.

In the case of the *State Freight Tax,* 15 Wall (82 U. S.) 232, this Court held, (P. 239)

> "The right of citizens of the United States to pass from point to point of the National territory, unrestricted by State regulation was emphatically asserted". See *Crandall* v. *the State of Nevada,* 6 Wall 25.

It was held that if taxing interstate commerce is not regulating it, it is not easy to imagine what would be and that a state had no power to tax or regulate interstate commerce. As a state has no power to tax or *regulate* interstate commerce then a Railroad Company has no such power because of powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. Amendment X, United States Constitution. The power to regulate commerce with foreign nations, and among the several states, etc. was specifically delegated to Congress by the United States Constitution, Article I,

Section 8, because it is a subject matter which requires uniformity as said by Alexander Hamilton in the "Federalist" No. 7. In that historic essay one of the founders of our country depicted the injurious consequences of permitting the several states to regulate commerce.

The principle of uniformity in regulating interstate commerce is succinctly restated in *Howitt* v. *United States*, 328 U. S. 189, 192, in the following language, (p. 192):

> "It is well established that one of the primary aims of the Interstate Commerce Act and the amendments to it was to establish uniform treatment of users of transportation facilities. See *Mitchell* v. *United States*, 313 U. S. 80, 94, 95. The Act again and again expressly condemns *all kinds of discriminatory practice.*"

In *Morgan* v. *Virginia*, 328 U. S. 373, 382, this court held that race segregation rules of a bus company which were in conformity with the separate coach law of Virginia were void because they burdened interstate commerce. The court held the law as well as the rules void and of no effect. In the case at bar we find the same situation. Through the geographical area served by the Southern Railway Company there are states which have different laws defining the term Negro or Colored person. In *State* v. *Treadaway*, 126 La. 302, an Octoroon was held not to be a Negro. The court exhaustively considered the judicial and statutory definitions of Negroes, Colored Persons, Mulattoes, Octoroons, Quadroons and various other persons who were neither Colored, Negroes or White. Other classifications of persons are discussed in the opinion showing the necessity in this regard of a uniform act such as the Interstate Commerce Act to govern interstate commerce without any additions or alterations by common carriers.

There are many persons traveling within the jurisdiction of the United States with dark skins and of a mixture of darker races. Many would be considered Colored persons by the Agents of the Railroad company although they are natives of foreign lands. See Sex and Race by J. A. Rogers, Vol. II, p. 2, 3.:

"So mixed were the Portuguese that in 1492 there was already a Negro strain in its royal family. The same was true in less degree of the Spanish royal family. As for Italy, it had not only once been overrun by the Moors, but Negro slaves in great numbers had been brought in, principally between the thirteenth and fifteenth centuries by the Venetians. The Pisanos and Genoese also imported a considerable number from Nubia, Ethiopia, Sudan, and Morocco, and sold them to the noble families, who used them as servants, grooms, and favorites, and even amalgamated with them. So little was the prejudice against color in Europe that in the Sixteenth century the son of a Negro female slave, or servant, rose to be the head of the most distinguished royal family of the time.

This may be considered extraordinary now but it was not so then. The southern Europeans had been accustomed for centuries to having dark-skinned men among their rulers, in fact, whole series of them. As Roy Nash says, 'Many North Americans profess horror at the marriage of white and colored types, which is so common in South America.' Mark well, then, that the first contact of the Portuguese and Spaniards with a dark-skinned people was the contact of the conquered with the brown-skinned conquerors. And the darker man was the more cultured, the more learned, and the more artistic. He lived in the castles and towns. He was the rich man and the Portuguese became serfs upon his land. Under such conditions it would be deemed an honor for the white to mate or marry with the governing class, the brown man, instead of the reverse. Nor was it only the

> Portuguese peasantry whose blood mingled with the Moors. Alphonso VI, who united Castille and Leon and Galicia in 1073, to cite but one of many instances of marriages between Christian and Arab nobles, chose a Moorish princess the daughter of the Emir of Seville, to be the mother of his son, Sancho'."

The mixture and blending of Negro people with the inhabitants of the United States, Mexico, Central and South America, Europe and Asia is so evident that we feel it unnecessary to demonstrate its results.

We submit that the proposition of law urged in this brief concerning the comprehensiveness of the plan governing interstate commerce in the Interstate Commerce Act is supported in numerous cases and we feel it only necessary to cite a few; *Texas and Pacific Ry. Co.* v. *Interstate Commerce,* 162 U. S. 197; 16 S. 666; 40 L. Ed. 940. See (162 U. S. 197, 209). *Lehigh Valley R. Co.* v. *Public Service Commission,* 272 Fed. 758; Affd; 257 U. S. 591; *Hines et al* v. *Davidowitz* 312 U. S. 52, 62, 63, 70; *U. S.* v. *F. W. Darby Lumber Co. et al.,* 312 U. S. 100, 113, 114, in which last case this court states (p. 113):

> "The power to regulate commerce is the power to 'prescribe the rules by which commerce is governed'. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect commerce but embraces those which prohibit it. (cases cited)."

In *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 211, 212, the court at p. 211 states:

> "the scope or purpose of the Act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the Act, be reasonable to anticipate that the legislation would cover, or have regard to *the entire field of interstate*

commerce and that its scheme or regulation would not be restricted to a partial treatment of the subject".

What right has a public utility to make or attempt to adopt a regulation having such effect in interstate commerce? The regulations are unreasonable burdens on interstate commerce.

In the words of Cardinal Stritch, which we take liberty to quote:

> "The work you are engaged in has very close connection with religion and religion is interested in your work. *That law* describes justice and the right compensation for those who do honest work. You are engaged in building a democracy that is based upon justice and charity. The people of our democracy have given you power. That power has brought responsibilities. You are intrusted today in a large measure with the preservation of our free institutions. In our nation, freedom is under God's law. Your decisions will determine what the future of the United States is to be".

It is respectfully contended that the uniform law promulgated by Congress known as the Interstate Commerce Act, is full and complete. The Southern Railway has no power to add to it, detract from it, extend it, or amplify it.

III.

The regulations or rules of the Southern Railway Company, effective on and after March 1, 1946 are void because they are vague, indefinite and uncertain.

We have in mind the fact that this brief is addressed to the highest court in our land. This court is composed of lawyers selected not only for their natural judicial abilities but also for their demonstrably fair and impartial judgment. We invoke the principle often expressed by this Honorable Court, that it has been left to the

Courts to formulate the Rules interpreting the Commerce clause in its application. *Southern Pacific* v. *Arizona*, 325 U. S., 761. We see destructive consequences to the Commerce of the nation if the protective influences of the courts are withdrawn. We are confident, too, that members of this Honorable Court are fully aware of the contribution to the progress of this nation made by American Citizens of Color on our historic battlefields from Bunker Hill to Okinawa.

Considering the contribution to our national culture of American citizens of color, we believe that this Honorable Court will decide this case, fairly, and in accordance with the Constitution and laws of our country—laws under which all American citizens are alike. American citizens of color today, as this court will recognize, by their merits demonstrated to the world that they are entitled to the same treatment in public accommodations as other American citizens.

Fifteen million persons who form a part of the population of this great country are colored. This Honorable Court will take judicial notice of the great mass of persons of varying complexions who constitute the population of this nation. There is but one God; there is but one American Nation. When a railway company by regulation attempts to separate American citizens in accordance with their race or color it contravenes cardinal facts of human existence.

There are American citizens of this Commonwealth, for example, whose complexions range from the darkest black to the lightest hue. By what standard or test is the steward of the dining car or the conductor of the train to determine the race to which these American citizens belong? We know that there are persons commonly called white persons, who are darker in color than

many American Negroes. There are many white persons from the Balkan countries who are dark in color and complexion. Practically it is impossible for an agent of the railway company to do more than guess the ethnical group to which an American citizen belongs. Liberty and freedom are too dear to citizens of our country when their enjoyment must depend on such vague, uncertain and indefinite regulation as the Dining Car Regulations here attacked.

We call the attention of this Court to Chapter 3, Sec. 41 (Title 8 U.S.C., 5) designated as a part of the Civil Rights Act, enacted by Congress in 1866 and reenacted in 1870 which provides that all persons within the jurisdiction of the United States shall have the same rights in every state and territory to the *full and equal benefit of all laws* and proceedings for the security of person and property as is enjoyed by *white citizens*, etc. White citizens of America have never been segregated because of the color of their hair, the color of their eyes, the size of their ears, the length of their nose, the texture of their skin or other biological classification.

American citizens of color have availed themselves of the educational advantages afforded by the best schools of the nation. There are among them graduates of Harvard, Yale, Columbia University, the University of Chicago, Northwestern University, University of Pennsylvania, Dartmouth College, University of New York City, University of Michigan, University of Illinois, Howard University and all universities and schools to which they have been admitted. Many have been graduated with honors. Men and women, American citizens of color, have graduated from the law schools of these universities and have been taught the basic premises of the Constitution of the United States. They know that laws made pursuant

thereto are not idle words. They are enacted into law for the protection of the substantial aspects of life, for all persons within the jurisdiction of the United States.

We do not believe that this Honorable Court with its members of great learning will permit discrimination and segregation to continue against American citizens of color when Liberty and Freedom and the principles of Democracy are lived and enjoyed by the peoples of every other race.

It was stated in *Joseph* v. *Bidwell,* 28 La. An. 382, 383, that, "* * * the Constitution does not enumerate a mere abstraction but if guarantees substantial rights. To facilitate the enforcement of these rights the General Assembly has enacted laws. It is the duty of the courts when called upon, to enforce them."

We believe this to be a fair, frank and important statement of real Democracy. This court in numerous cases has condemned laws which are vague, indefinite and uncertain particularly when they affect the rights and liberties of American citizens. It is only necessary to call the attention of this Honorable Court to a few of the cases without extensive quotations therefrom. *U. S.* v. *Cohen Grocery Company,* 225 U. S. 81-89; 41 Sup. Ct., 298, 300, *U. S.* v. *Reese,* 92 U. S. 214-219-220, *U. S.* v. *Simmons,* 96 U. S. 360, *U. S.* v. *Capital Traction Co.,* 34 App. D. C. 592, *Connally v. General Construction Co.,* 269 U. S., 385, 46 Sup. Ct. 126-129 and numerous other cases well known to this Honorable Court.

Although the regulations or rules of The Southern Railway Company were not enacted by any legislative department of any government, they have been approved by the Interstate Commerce Commission, an agency of the Government. These regulations have further been approved by the United States District Court. They have

the effect of laws for which disobedience subjects the offenders to public prosecution. Such administrative and judicial sanction should not be allowed to stand.

IV.

The dining car regulations adopted by the Southern Railway Company are void because they violate Section 3 (1) of the Interstate Commerce Act.

In creating the Interstate Commerce Commission the Congress of the United States declared it the duty of every carrier subject to the act to "establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service * * *" Title 49 U.S.C., Sec. 1 (11). In the same section Congress declared that "every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared unlawful."

We have already pointed out that in Section 3(1) of the Interstate Commerce Act Congress declared it "unlawful for any common carrier subject to the Act to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This court has construed this section as prohibiting all kinds of discriminatory practices. *Howitt* v. *United States*, 328 U. S. 189. And in *Mitchell* v. *United States*, 313 U. S. 80, this court held that the denial to a colored passenger of railway services because of the requirements of race separation was "unjust." We respectfully submit that the treatment of Appellant in the instant case, and the contemplated treatment of other American citizens who are subjected to the Dining Car Regulations here attacked are similarly unjust and unreasonable.

Thus, we contend, the Dining Car Regulations of March 1, 1946, adopted by the Southern Railway Company, are void because they violate an important provision of the Interstate Commerce Act.

The rule we invoke has been frequently applied. In *Robinson* v. *Southern Pacific Company*, 105 Cal. 526, 38 Pac. 722, 723, Mr. Chief Justice Beatty in giving the opinion of the court applied the doctrine we assert here and said:

> "It is said that the ticket is not the contract; that it is a mere token or voucher, and that it is the duty of the passenger to inform himself of the rules and regulations of the carrier. This is, perhaps, true to a certain extent. *But the passenger is not bound to take notice of any rule or regulation which contravenes the law of the land* • • •"

Mr. Chief Justice Ludeling, speaking for the court in *Decuir* v. *Benson*, 27 La. Ann. 1 at page 6, said:

> "That a common carrier may make reasonable rules and regulations for the government of passengers on board his boat or vessel is admitted, *but it cannot be pretended that a regulation which is founded on prejudice and which is in violation of law is reasonable.*"

Now turning to the Dining Car Regulations of the instant case we submit that they were conceived out of race prejudices. They are based on the rather erroneous assumption that every American citizen of color is so obnoxious a person that he must be relegated to a small portion of a railway diner. They also presuppose that every white American citizen desires to avoid association with colored passengers. The fact that often American citizens of all races mingle on business and professional levels is completely ignored in order that race prejudices shall predominate. Small categories of race classifications are made without standards or tests to guide those who must administer the rules. Admittedly, the employees of the appellee railway company are not qualified to apply tests of race classifications if such were included in the rules. Yet, by these Dining Car Regulations ordinary laymen

will be required to do that which has baffled anthropologists and social scientists: that is, the task of finding an accurate ethnic category for average American citizens on appearances alone. In this manner, one American citizen who to the railway employee appears to be a colored person will be given service behind a partitioned section of the car—the limited space area reserved for colored passengers; the other American citizen who to the railway employee appears to be a white person—and who paid the same first class fare—will be served in the spacious, well apportioned section of the diner. If this is not abhorrent discrimination we have great difficulty in finding a better description for such practices. And we earnestly submit to this court, that such practices have no place in interstate travel that is subject to the jurisdiction of the federal government, a government that has been modeled under an organic document that has inspired men the world over. We ask this court, therefore, to declare these regulations void, and to reverse the judgments below.

CONCLUSION.

The briefs of the appellant and of the United States of America have ably discussed the cases of *Plessy* v. *Ferguson*, 163 U. S. 537, 538, 540, 16 Ct. 1138, 41 L. Ed. 256 (1896), and *Chiles* v. *Chesapeake & Ohio Railway Company*, 218 U. S. 71, 72, 74 (1910), 54 L. Ed. 936, 30 S. Ct. 667, in refutation of the claim by the Southern Railway Company, and the Interstate Commerce Commission that these cases were authority for the actions of the Southern Railway Company and the Interstate Commerce Commission in the promulgation of such un-American rules, which discriminate and segregate American citizens of color in interstate commerce, solely by

reason of their color or race. We believe it is necessary to quote from the opinion of these cases to show that the issues involved do not concern interstate commerce, and therefore are not authorities in the case at bar.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 538, this honorable court states the issue involved, and merely reading the case demonstrates its inapplicability. On page 538 this court states:

> "That on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington in the same State, etc."

This clearly shows that any question raised or decided must necessarily relate to *intrastate* transportation, and not *interstate*.

Unless we set aside, annul and disregard all fundamental principles of American procedure, it is perfectly apparent that any attempt to discuss interstate commerce where the sole issue involved is intrastate commerce, such discussion is *obiter dicta*.

In *Chiles* v. *Chesapeake & Ohio Railway*, 218 U. S. 71, 72, 74, a cursory reading of this opinion will also clearly show that the issue involved does not deal with *interstate commerce*, but was solely limited to *interstate commerce*, such was the finding of the Court of Appeals, the court of last resort of the State of Kentucky, and of this Honorable court.

The fact that the question of interstate commerce was not considered by either of the courts is well stated on page 74 of the opinion of this court:

> "There is a statute of Kentucky which requires Railroad Companies to furnish separate coaches for the white and colored passengers, *but the Court of Appeals of the state put the statute out of considera-*

tion, declaring that it had no application to INTERSTATE TRAINS, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations."

We submit that this quotation from the opinion of this honorable court is conclusive, that no question of *interstate* commerce was involved, and therefore this case is no authority for any issue involving *interstate* commerce.

Equality of all American citizens without regard to race, color or national origin is proclaimed to the world by this, our country. Is it to be made real by the decision of this court, or is it to be used as a mockery against the administrators of our government? The doctrine of equal rights and equal opportunities are daily taught in the schools, homes, colleges and universities of the United States, and these fundamental principles of American Government are heralded upon the floors of Congress and constantly enunciated by the Chief Executive of this nation.

We do not condone the un-American activity evidenced in certain parts of our native land, and insist that the principles enunciated by the Constitution and laws made pursuant thereto be upheld.

The issues involved in this case are limited to *interstate commerce,* over which Congress has exclusive jurisdiction, a principle so well settled as to be axiomatic. When we consider the indisputable fact, judicially known, that in interstate commerce, chickens, cows, pigs, horses and animals of every color are transported from state to state without being discriminated against by segregation, solely on account of their color, it is indeed startling that in this day and age human beings who are American Citizens of color are the only persons segregated and discriminated against in *interstate commerce.*

We respectfully submit there is no justification for such undue and unfair discrimination by segregation as appears in this case. We expect this honorable court to perform its duties, as learned men of law and whose hearts are filled with the Christian spirit of justice and equal rights in its fullest sense, to American Citizens regardless of race, color or national origin which are God given qualities.

Respectfully submitted,

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Dated this the 24th day of January, A. D. 1950.

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Member of the Supreme Court of the United States.

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IN THE

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October Term, 1949

No. 25

ELMER W. HENDERSON,

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v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY.

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MOTION FOR LEAVE TO FILE BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND AMERICAN JEWISH COMMITTEE AS AMICI CURIAE

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith and the American Jewish Committee and on their behalf, respectfully move this Court for

leave to file a brief in this case as *amici curiae*. Permission has been secured from all parties with the exception of the intervening respondent, the Southern Railway Company, which has refused its consent.

Each of these organizations is dedicated to the preservation of democratic rights guaranteed all citizens by our Federal Constitution. Each has long since recognized that the invasion of the rights of any individual or group on the basis of race undermines the foundation of rights guaranteed to all groups in our democracy.

The present case causes us deep concern because it shows that discrimination against Negroes in interstate transportation is supported by regulations of the Interstate Commerce Commission, a Federal agency. It is high time that the "separate but equal" doctrine, on which these regulations are based, be exposed as a device to permit discrimination against Negroes. The belief in racial superiority and inferiority, which is the foundation of the "separate but equal" doctrine, is a direct negation of the ideas which underlie the American concept of democracy. We are deeply convinced that any infringement of democracy in our country is a direct threat to every racial and religious group, including American Jewry.

We intend to stress in our brief *amici curiae* that the regulations of the Interstate Commerce Commission permitting segregation, which are in issue in the present case, may operate to deny the constitutionally safeguarded rights not only of Negroes but also of non-Negroes, since the arbitrary reservation of facilities on a racial basis may deny non-Negroes access to otherwise unused facilities. We also intend to point out that the regulations of the Interstate Commerce Commission are in conflict with the treaty obligations of the United States under the United Nations Charter and with the policy which finds expression in the Universal Declaration of Human Rights, adopted and proclaimed on December 10, 1948, by the General Assembly

of the United Nations with the concurrence of the representative of the government of the United States. We believe that these arguments have not been adequately presented by the parties.

Dated, New York, New York, December 9, 1949.

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